FILED
JUL 27 1998
OFFICE OF THE CLERK

No. 98-186

In The

Supreme Court of the United States

October Term, 1997

UMIC, INC. and ALEX CHARLES DENNEY,

Petitioners,

v.

FEDERAL DEPOSIT INSURANCE CORPORATION, as Manager of the FSLIC RESOLUTION FUND,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. WHETHER THE DECISION BELOW CLEARLY CONFLICTS WITH DECISIONS OF THIS COURT, *O'MELVENY & MYERS v. FDIC*, 512 U.S. 79, 114 S.Ct. 2048, 129 L. Ed. 2d 67 (1994) AND *ERIE R. CO. v. TOMPKINS*, 304 U.S. 64 (1938), PRECLUDING THE APPLICATION OF FEDERAL COMMON LAW TO DECIDE STATE COMMON LAW CLAIMS?

II. WHETHER UNDER FEDERAL LAW CONSTRUING THE COMMODITY EXCHANGE ACT CREDIT MUST BE GIVEN FOR SUMS RECEIVED IN SETTLEMENT OF CLAIMS AGAINST NON-DEFENDANT TORTFEASORS WHEN THE SETTLEMENT AGREEMENT FAILS TO ALLOCATE AMOUNTS FOR DIFFERENT DAMAGES?

RULE 29.6 STATEMENT

All Parent Companies and Non-wholly Owned Subsidiaries of Each Corporate Filer:

UMIC, Inc. is a subsidiary of Union Planters Investment Bankers Corporation which is a subsidiary of Union Planters Corporation

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PETITION FOR WRIT OF CERTIORARI

Petitioners UMIC, Inc. and Alex Charles Denney respectfully pray that a writ of certiorari issue to review the Opinion of the Tenth Circuit Court of Appeals, filed February 18, 1998 and the Order of the Tenth Circuit of Appeals denying appellant's petition for rehearing filed April 28, 1998, and the Judgment entered thereon.

OPINIONS BELOW

The Opinion of the Court of Appeals for the Tenth Circuit is reported in 136 F.3d 1375 (10th Cir. 1998) and a copy of the slip opinion appears in the Appendix hereto at Appendix 1.

JURISDICTION

The Opinion of the Court of Appeals for the Tenth Circuit was filed on February 18, 1998, and petitioners timely filed a Petition to Rehear. The Petition to Rehear was denied April 28, 1998. This Petition for Certiorari was filed within ninety (90) days of the date of the denial of the Petition to Rehear. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1) (1994).

STATEMENT OF THE CASE

In April 1987 the FSLIC[1] as successor to Universal Savings & Loan ("Universal"), a defunct Oklahoma S & L, brought suit against Geldermann, Inc., a futures commission merchant; UMIC, Inc., Geldermann's introducing broker; Alex Charles Denney, UMIC's representative; Arthur A. Wallace and Bryan F. Green, Universal's president and vice-president respectively; and Gregg Crosby,[2] an officer of Universal's subsidiary Universal Futures, Inc.[3] The FDIC sued for losses sustained in Universal's commodity accounts with Geldermann. Universal opened its first commodity account with Geldermann in December 1983. Trading in that account did not begin until March of that year, and it continued through April 1986. The FDIC never contended the losses in Universal's commodity accounts with Geldermann caused Universal to fail.

Although the FDIC prosecuted the case on numerous different theories, the case went to trial only on theories of common law fraud and breach of fiduciary duty, and their derivative claims of aiding and abetting, under Oklahoma law and violations of the Commodities

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[1] Pursuant to the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 ("FIRREA"), 12 U.S.C. §1821a(a)(5)(A) (1994), in September 1989 the Federal Deposit Insurance Corporation ("FDIC") succeeded FSLIC as plaintiff. Hereinafter the plaintiff will be referred to simply as the FDIC.

[2] The FDIC dismissed Crosby prior to trial under FRCP 41(a)(1).

[3] Universal Futures, Inc. was an entity created by Universal's board to advise it and, for a fee, other S & Ls on the use of futures and options.

Exchange Act (CEA). The FDIC sought recovery of approximately $6.2 million in losses in Universal's commodity accounts with Geldermann, $5 million in prejudgment interest and punitive damages of fifteen million dollars. On the first day of trial, the FDIC settled with Geldermann for the sum of $600,000. The settlement agreement released Geldermann from all liability in connection with trading in Universal's commodity accounts with Geldermann.

After a three week trial, the jury returned a verdict and awarded damages under the Oklahoma common law claim of breach of fiduciary duty against UMIC in the amount of $624,000 and against Denney in the amount of $288,000 (total $912,000). In addition, the jury awarded an additional $288,000 against Denney on two CEA counts. The jury found in favor of Wallace and Green on all counts and in favor of UMIC and Denney on all other Oklahoma common law and CEA counts.

After entry of the judgment, citing *O'Melveny & Myers v. FDIC* and relevant Oklahoma common law, UMIC and Denney requested credit for $600,000 paid by the settling alleged joint tortfeasor Geldermann (the "Geldermann settlement") and credit for the $725,000 for which the FDIC had already settled with Universal's directors (the "Sevier" settlement).[4] Without addressing

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[4] In 1987 the FDIC sued one of Universal's presidents (Wallace's predecessor David Harris) and its directors for alleged losses from speculating in thirty year U.S. Treasury bonds during 1983 and the first half of 1984 in *F.D.I.C. v. Larry Sevier, et al.*, United States District Court, Western District of Oklahoma, CIV-87-2015-R (the *"Sevier"* action). The *Sevier*

the issue of whether Oklahoma law applied, the district court, citing federal cases only, denied UMIC and Denney's motion for credit for the Geldermann and *Sevier* settlements.[5] The basis for the denial of the Geldermann credit was that at the time of the Geldermann settlement, no breach of fiduciary duty claim was pending against Geldermann.[6] As to the allegations against Geldermann concerning violations of the CEA, the trial court found that the "conduct" of Geldermann which gave rise to such allegations was different from that of UMIC and Denney.[7] Accordingly, the district court found that the Geldermann settlement did not represent damages common to those represented by the jury verdict against UMIC and Denney.[8]

Using similar reasoning, the district court denied UMIC and Denney's request for credit for the $725,000 settlement with Universal's directors. The court found that the directors were sued for specific violations of federal banking laws and others and that the counts upon

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action did not involve any of the defendants in the Geldermann action. In the fall of 1989 when the Geldermann action had just begun, the FDIC settled with the *Sevier* defendants, releasing them from all claims arising from their service as directors or officers of Universal, including any claims for misfeasance during the period of the Geldermann allegations. The *Sevier* defendants were all involved in the futures and options trading which formed the basis for the Geldermann action.

[5] Order. (Appendix 40-41).

[6] *Id.* (Appendix 41-42).

[7] *Id.* (Appendix 43).

[8] *Id.*

which the jury found against UMIC and Denney – breach of fiduciary duty and violation of the CEA – were different.[9] Accordingly, the court reasoned that the *Sevier* settlement and the damages suffered by Universal in the instant case were not the same.[10]

UMIC and Denney appealed to the Tenth Circuit seeking a credit for the Geldermann and *Sevier* settlements in the amount of $600,000 and $725,000 respectively against the $912,000 total damages awarded by the jury on the Oklahoma common law breach of fiduciary duty claim and the $288,000 in damages awarded on the CEA claim. As grounds for their appeal UMIC and Denney relied upon *O'Melveny & Myers v. FDIC*, 512 U.S. 79 (1994) for authority for the requirement that Oklahoma law be applied when deciding the issue of what credit the defendants should receive for prior settlements for amounts awarded on an Oklahoma common law breach of fiduciary duty claim. UMIC and Denney also argued that they should receive credit on the CEA claim as well.

Citing *U.S. Industries, Inc. v. Touche Ross & Co.*, 854 F.2d 1223 (10th Cir. 1988), a Tenth Circuit case applying federal common law and Utah common law, the Tenth Circuit denied the defendants' request for credit against damages awarded under both the Oklahoma common law claim and the CEA claim.

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[9] *Id.* (Appendix 41).

[10] *Id.* (Appendix 41).

REASONS FOR GRANTING THE WRIT

I. THE DECISION BELOW CLEARLY CONFLICTS WITH DECISIONS OF THIS COURT PRECLUDING THE APPLICATION OF FEDERAL COMMON LAW TO DECIDE THE RESOLUTION OF STATE COMMON LAW CLAIMS.

In *O'Melveny & Myers v. FDIC, supra,* a case also involving the FDIC, the Supreme Court reiterated the principle long established by *Erie R. Co. v. Tompkins* that there is no federal general common law. In *O'Melveny* the FDIC had sought to fashion a federal common law to preempt state common law defenses to claims the FDIC was prosecuting, which arose under state common law. This Court held that the FDIC, as successor to a state chartered institution has no greater rights that those of the S & L into whose shoes it steps. In such circumstances the FDIC merely obtains the rights the institution had under state law prior to receivership. *O'Melveny,* p. 2054. Subsequent decisions of this Court have reiterated this principle, quoting favorably from *O'Melveny* in declining to fashion federal common law rules in such cases as this.

> "Cases in which judicial creation of a special federal rule would be justified . . . are . . . 'few and restricted' ". . . . "[N]ormally, when courts decide to fashion rules of federal common law 'a significant conflict between some federal policy or interest and the use of state law . . . must first be specifically shown.' *Ibid.* Indeed, such a 'conflict' is normally a 'precondition.' " *Atherton v. Federal Deposit Insurance Corporation,* ___ U.S. ___, 117 S.Ct. 666, U.S. Lexis 461, *7 (1997), citing *O'Melveny* at 2055.

In the instant action the FDIC sought recovery under numerous theories under Oklahoma state law and the Commodities Exchange Act. The jury awarded damages against UMIC and Denney on the Oklahoma common law breach of fiduciary duty claim and against Denney for violation of the Commodities Exchange Act. Of the $1.2 million in damages awarded by the jury, $912,000 were for breach of fiduciary duty by UMIC and Denney under Oklahoma common law.

Accordingly, on the issue of whether they are entitled to credits for the Geldermann and *Sevier* settlements, UMIC and Denney, relying upon *O'Melveny & Myers*, insisted in their appeal to the Tenth Circuit that the district court had erred, and must look to Oklahoma law on the issue of whether they are entitled to credits for the Geldermann and *Sevier* settlements. The outcome of the case will be radically affected depending upon whether Oklahoma common law or the Tenth Circuit's federal common law is applied.

On the issue of credit for a settlement by a joint tortfeasor, Oklahoma follows the "one satisfaction" rule. *Kirkpatrick v. Chrysler Corporation*, 920 P.2d 122 (Okla. 1996) at 132. *Restatement (Second) of Torts* §885(3) (1979) defines the rule as:

> A payment by any person made in compensation of a claim for a harm for which others are liable as tortfeasors diminishes the claim against the tortfeasors, at least to the extent of the payment made, whether or not the person making the payment is liable to the injured person and whether or not it is so agreed at the time of

payment or the payment is made before or after judgment.

In application of the "one satisfaction" rule, Oklahoma common law applies the *pro tanto* rule. *FDIC v. United Pacific Ins. Co.*, 20 F.3d 1070, 1082-83 (10th Cir. 1994) (applying Oklahoma law). This rule requires that the amount paid by one settling joint tortfeasor reduces the amount recoverable against non-settling joint tortfeasors on a dollar for dollar basis. *United Pacific Ins. Co.*, at 1082-83 (jury returned verdict for FDIC as insured bank's receiver in suit against fidelity insurer to recover loan losses caused by dishonest employees; insurer held entitled to dollar for dollar credit against judgment for amounts FDIC received from law firm in settlement of prior suit relating to same losses); *Kirkpatrick*, 920 P.2d at 133 n. 9; *City of Tulsa v. McIntosh*, 90 Okla. 50, 215 P. 624 (1923); *Safety Cab Co. v. Fair*, 181 Okla. 264, 74 P.2d 607 (1937). Credit is required regardless of the nature of the cause of action. For instance, the rule was held applicable in a case involving breach of fiduciary duty in *American National Bank of Enid v. Crews*, 191 Okla. 53, 126 P.2d 733, 745 (1942).[11]

Based upon these authorities, UMIC and Denney argued to the Tenth Circuit that Oklahoma common law required giving them credit for the Geldermann and Sevier settlements. Citing its earlier opinion *U.S. Industries, Inc. v. Touche Ross & Company*, 854 F.2d 1223 (10th Cir. 1988), the Tenth Circuit acknowledged that the "one

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[11] However, in *American National* the court found defendants' proof had failed, and therefore, defendants were not entitled to any offset.

satisfaction rule" applied, but instead of looking to Oklahoma law, it looked to federal common law for the application of this rule. Quoting *Touche Ross*, the Tenth Circuit found that "a party seeking credit for an amount received in settlement bears the burden of proving that the damages assessed against him have . . . been previously covered in a prior settlement." *Touche Ross* involved federal securities claims and pendant Utah common law claims. *Touche Ross* does not discuss whether giving credit under Utah law differs from that under a federal securities claim. The presumption apparently is that Utah common law and federal common law is the same.

Oklahoma law differs from the Tenth Circuit's federal common law on this issue. Under Oklahoma law the FDIC had the burden to prove at trial that any damages resulting from the acts of UMIC and Denney were distinguishable from the damages which the FDIC had recovered from other tortfeasors, Geldermann and Universal's directors and former president, and from which those tortfeasors had been released.

> Oklahoma law allows only one recovery to make a plaintiff whole. . . . Consequently, in the present action, the [plaintiff] will have to show that any damages which resulted from the alleged acts of the [defendants] are distinguishable from the damages which she has already recovered. . . .

Carris v. John R. Thomas & Associates, P.C., 896 P.2d 522, 530, n. 21 (Okla. 1995).

Under *O'Melveny & Myer*, *Carris*, not federal Tenth Circuit law, must control, and the Tenth Circuit improperly imposed the burden on UMIC and Denney to prove

that the damages assessed against them had been previously covered in prior settlements with Geldermann and Universal's directors and former president.

The Geldermann settlement. The FDIC did not carry its burden of proof in showing that the damages which it was seeking from UMIC and Denney were different from those for which it had settled with Geldermann. In fact, at trial the FDIC contended and proved the opposite. From the original Complaint through the Amended Second Revised Final Pretrial Order ("Pretrial Order"), filed after Geldermann's settlement and dismissal, the FDIC contended Geldermann was a joint tortfeasor with UMIC and Denney, jointly and severally liable with them. (Appendix 50-52). In its settlement agreement in which the FDIC settled with Geldermann, the FDIC acknowledged that UMIC and Denney were joint tortfeasors with Geldermann. (Appendix 69-70). Further, during the trial, the FDIC contended that UMIC and Denney were Geldermann's agents (Appendix 52-53) and that Geldermann was liable for UMIC and Denney's acts. (Appendix 54-55). Further, over defendants' objection, the FDIC introduced at trial a Geldermann document, which discussed its fiduciary duties, for the purpose of showing that UMIC and Denney owed fiduciary duties to Universal by virtue of the fact that UMIC was an introducing broker for Geldermann. (Appendix 77-79). The damages sought by the FDIC prior to the Geldermann settlement were the same it sought after the settlement – the losses in Universal's commodity accounts at Geldermann, "in excess of $6 million." (Appendix 56).

The Sevier settlement. In the Sevier settlement, which occurred just as the Geldermann action was beginning,

the FDIC released former president Harris and the directors from all liability they might have in connection with their affiliation with Universal. In previous court papers, filed with an earlier appeal in the Tenth Circuit,[12] the FDIC sought to cut off the Geldermann defendants' contribution rights against former president Harris and the Universal directors. Initially in its appellate papers, the FDIC acknowledged that the Geldermann defendants would be entitled to a credit for the Sevier settlement. (Appendix 76). Later in these papers, the FDIC stipulated that the Geldermann defendants were entitled to a credit of at least $200,000 as a result of the Sevier settlement. (Appendix 72).

The Settlement Agreement in the *Sevier* action does not differentiate between or among the claims asserted in *Sevier* and those involved in the instant case. (Appendix 59, 61-62). It simply releases Universal's directors and former president from all liability with respect to Universal.

Under Oklahoma law, the FDIC had the burden to differentiate. *Carris, supra.*[13] The FDIC called the directors

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[12] *Federal Deposit Insurance Corporation v. Geldermann, Inc., et al.*, 975 F.2d 695 (10th Cir. 1992).

[13] In *Hess Virgin Islands Oil Corp. v. UOP, Inc.*, 861 F.2d 1197, 1208-1209 (10th Cir. 1988), the Tenth Circuit upheld the Oklahoma district court which in the absence of any Virgin Islands precedent construed the law of the Virgin Islands in similar circumstances. In *Hess Oil* the court found that the entire amount of a settlement must be credited against a verdict as a result of the failure of the settlement language to differentiate the damages. *Hess Oil*, 861 F.2d at 1209:

as witnesses in the instant case, yet it failed to differentiate any damages allegedly caused by the directors and former president from those alleged here.

Further, Oklahoma law provides a tortfeasor who is adjudged liable to plaintiff is entitled to credit for settlement by other tortfeasors, even though the two tortfeasors did not act in concert and the acts upon which their respective liability was based were successive and performed independently of one another. *Anderson v. O'Donoghue*, 677 P.2d 648 (Okla. 1983); *Radford-Shelton and Associates Dental Laboratory, Inc. v. St. Francis Hospital, Inc.*, 569 P.2d 506 (Okla. App. 1976); *In re Jones*, 804 F.2d 1133 (10th Cir. 1986) (applying Oklahoma law). This principle is followed even though the settling defendant has caused some damage which occurred prior in time to the tortious acts of the non-settling defendant. *In re Jones, supra*, 804 F.2d at 1143.

The directors were not parties to this suit, but they participated in the futures and options trading. Further, as a requirement of their settlement with the FDIC, they participated in the trial. For these reasons, they qualify as joint tortfeasors under Oklahoma law.

As established by the discovery and evidence in this case, the claims against the defendants here were integrally related to and inseparable from the issues in *Sevier*.

Because of the generality of the settlement between HOVIC and the settling defendants, and the fact that the verdict against UOP included the same type of damages included in the settlements, the trial court correctly held that UOP is entitled to a full credit of $1,500,000 on its liability to HOVIC.

In *Sevier* the FDIC claimed that the directors were guilty of negligence, breach of fiduciary duty, waste of corporate assets and violation of statutory duty in connection with their acts and omissions in monitoring the leveraged trading in Treasury bonds by Universal's president, Mike Harris.

In the instant case, claimed wrongs litigated at trial arose from the decision by Harris and Universal's board (the identical board members named in *Sevier*) to extricate Universal from its disastrous trading in Treasury bonds by use of financial futures and options. To that end, Universal opened the account at Geldermann through UMIC in December 1983 and first traded in the account on March 28, 1984. The activity in that account provided the core facts around which this action was tried.

Not only are the actions and omissions specifically alleged in *Sevier* irrefutably linked to those charged here, but additional evidence adduced at trial showed that the directors, if anything, bore more culpability with respect to these facts than they did in *Sevier*. Here, in light of Harris' disastrous trading, the directors paid close attention to what was being done with the new account at UMIC. If they had not, given Harris' previous trading, they would surely have breached their fiduciary duties to Universal. Hence, if UMIC and Denney can be said to have violated any duties, then the directors were subject to the same charges.

Most important of all, Universal suffered a single, defined loss as a result of the activities in the initial purchase of the Treasury bonds by Harris and the

attempts to extricate Universal from that predicament through use of futures and options in the UMIC account, which Harris was the first president to use.

The uncontradicted evidence at trial established that the activities in the Geldermann accounts were successful not only in keeping Universal alive for another two years, but also enabled it to realize a gain on the "asset side" of the balance sheet. Green testified that Universal's income from futures and options permitted Universal to hold on to the Harris bonds until the market rallied and the bonds recovered from what had been, in June 1984, a mark to market net loss in excess of $10,000,000. (Appendix 80). Marsha Coffey ("Coffey"), defendants' expert, testified that had Universal held only $25,000,000 of the 12% bonds (out of the total of $65,000,000) through April 7, 1986, the bonds would have increased in value over $11,500,000. (Appendix 81-82). The *Sevier* case never resulted in an adjudication of the facts, and in the instant case, the FDIC offered no testimony to counter that of Green and Coffey.

As a result, all losses from the Harris-directed Treasury bond purchases were directly tied to the subsequent futures and options trading through Geldermann/UMIC which Universal employed in an attempt to minimize and eliminate the original losses.

In re Jones, supra, presented a remarkably similar factual pattern. There, an oil field service company was hired to correct problems with an oil well created by prior contractors. Even though the well suffered some damage for which the initial, settling contractors were

solely responsible, the Court of Appeals held the subsequent contractor was entitled to full credit against the judgment for the settlement with the prior contractors.

As a rationale for concluding that UMIC and Denney had not carried their federal common law burden, the Tenth Circuit cited the standard pattern jury instruction, which instructs the jury to consider the liability of each defendant separately. This rationale completely misses the mark and cannot stand as a basis for denying UMIC and Denney credit for other settlements. In this and every case with multiple defendants, the jury must separately decide the liability of each defendant. Moreover, Geldermann was no longer a defendant. The directors and Harris were never defendants. The FDIC could have made the directors and Harris defendants in this matter initially, but apparently chose not to do so. Later, after the Tenth Circuit reversed the FDIC's attempt to limit any credit the defendants might be entitled to on the grounds that the directors who were the real party in interest were not in the suit,[14] the FDIC still did not make the directors and Harris parties. Accordingly, the jury was not asked and did not consider whether Geldermann and the *Sevier* defendants were joint tortfeasors with UMIC and Denney.

Given the controlling Oklahoma law, the fact that the FDIC prosecuted the case on the theory that UMIC and Denney were Geldermann's agents, and the fact that the defendants proved the involvement by the directors and Harris in the futures and options trading, the jury instruction to consider the liability of each defendant

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[14] *Federal Deposit Insurance Corporation v. Geldermann, supra.*

separately fails as a rationale for denying credit for the Geldermann settlement.[15]

Accordingly, by refusing to follow *O'Melveny & Myers* and apply controlling Oklahoma case law, the Tenth Circuit altered the outcome of the case by one hundred and eighty degrees, denying defendants UMIC and Denney credit on the Oklahoma common law claims for settlements from settling tortfeasors – $600,000 from Geldermann and $725,000 from the Universal directors and former president Harris.

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[15] Once this jury instruction fails as an underpinning for the argument that UMIC and Denney did not carry their federal common law burden, the very argument itself fails. In fact, it is clear that even under the federal common law standard which would apply to the CEA claim, UMIC and Denney met their burden. Under *Touche Ross*, UMIC and Denney need only show that the FDIC settled claims with others on which they were found liable at trial. Once they had done so, the burden then shifted to the FDIC to prove that, under the terms of its agreement with the settling parties, the settlement did not represent common damages with the jury award. *Touche Ross* at 1262. The FDIC sought damages from UMIC and Denney in excess of $6 million dollars – the losses in Universal's commodity accounts at Geldermann. (Appendix 56). The FDIC's settlement with Geldermann released it from all liability on all claims made against it in this litigation in connection with Universal's accounts and made no allocation of the settlement sum. (Appendix 68-70). The FDIC tried the case in Geldermann's absence alleging that UMIC and Denney were liable as Geldermann's agents, *supra*, pp. 11-12. Having demonstrated that the FDIC settled claims with Geldermann for which they were found liable, the burden passed to the FDIC to show that the damages awarded by the jury were not covered in its settlement with Geldermann. The FDIC never met its burden.

II. UNDER FEDERAL LAW CONSTRUING THE COMMODITY EXCHANGE ACT CREDIT MUST BE GIVEN FOR SUMS RECEIVED IN SETTLEMENT OF CLAIMS AGAINST NON-DEFENDANT TORTFEASORS WHEN THE SETTLEMENT AGREEMENT FAILS TO ALLOCATE AMOUNTS FOR DIFFERENT DAMAGES.

The court below refused to give credit to the defendants for sums received from the Geldermann and Sevier settlements on the CEA claim as well. Basing its decision upon a pattern jury instruction, the Tenth Circuit held that the jury had only determined the damages for which the defendants were responsible and had not determined all the damages that Universal had suffered from its trading futures and options. Accordingly, the court below found that the damages for which the settlement sums were received were not the same as those for which the jury awarded damages.

In the Geldermann settlement, the FDIC specifically released Geldermann from all liability for claims arising from Universal's accounts with it. Geldermann is obviously being released from all liability for Universal's activity in its accounts with Geldermann. However, in the Sevier settlement the parties acknowledged that the *Sevier* defendants could be joint tortfeasors in the Geldermann suit.[16] The *Sevier* action alleged damages for an earlier but overlapping time period based upon theories of

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[16] The Order Confirming Good Faith Settlement entered in the *Sevier* action, currently a matter of record and reported at 1990 WL 299102 (W.D. Okla.), acknowledges that the *Sevier* defendants may be joint tortfeasors with other parties.

breach of fiduciary duty and violations of the federal banking and securities laws. Nevertheless, the settlement agreement was not so limited, and it released the directors and Harris from liability for all activities in connection with Universal. Moreover, the Sevier settlement agreement did not allocate any settlement sums to any specific damages – whether from violations of the federal securities, commodities or banking laws or Oklahoma state common law claims.

The decision below conflicts with *MacKethan v. Burrus, Cootes and Burrus*, 545 F.2d 1388 (4th Cir. 1976), *cert. denied*, 434 U.S. 826 (1977). In *MacKethan*, the receiver of a failed savings and loan recovered a $1,100,000 verdict against an accounting firm, predicated upon an aiding and abetting violation of the federal securities acts. The defendants sought to offset against the verdict the sum of $6,000,000 recovered by the Receiver through settlement of prior suits against the institution's officers and directors and against another party. Because the jury had not been asked to determine whether the damages awarded represented all of the damages suffered by the S & L, the court found at least a partial overlap between the previously settled actions and the trial against the accountants, and directed that the settlement be credited against the verdict and that judgment be entered for the defendant accounting firm.

In addition, the decision below conflicts with dicta in the earlier Tenth Circuit opinion – *Touche Ross*. In *Touche Ross* the Tenth Circuit cited with approval two decisions, one from Florida and the other from California, for the proposition that where a settlement agreement fails to

apportion proceeds among the separate and distinct damages involved, the total amount of the settlement must be setoff from the entire verdict. *Touche Ross*, at 1262, citing *Dionese v. City of West Palm Beach*, 500 So.2d 1347, 1349 (Fla. 1987) and *Knox v. Los Angeles County*, 167 Cal. Rptr. 463 (1980).

For these reasons as well the Court should review the Tenth Circuit's decision and bring it into conformity with other decisions interpreting federal law.

CONCLUSION

For these reasons a writ of certiorari should issue to review the judgment and opinion of the Tenth Circuit.

Respectfully submitted,

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PUBLISH

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

FEDERAL DEPOSIT INSURANCE CORPORATION,	)	
Plaintiff-Appellee and Cross-Appellant,	)	Nos. 96-6089 96-6123
v.	)	
UMIC, INC, a Tennessee corporation; Charles Alex Denney,	)	(Filed
Defendants-Appellants and Cross-Appellees,	)	Feb. 18, 1998)
and	)	
Arthur A. Wallace; Bryan F. Green,	)	
Defendants.	)	

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA (D. Ct. No. CIV-89-609-T)

Robert A. McLean, Wolff Ardis, P.C., Memphis, TN (George Dahnke, Abowitz & Rhodes, Oklahoma City, OK, and James W. McDonnell, Jr., Wyatt, Tarrant & Combs, Memphis, TN, with him on the briefs), for Defendants-Appellants-Cross-Appellees.

Jaclyn C. Taner, Counsel (Ann S. DuRoss, Assistant General Counsel, Colleen B. Bombardier, Senior Counsel, and

Lawrence E. Richmond, Counsel, with her on the briefs), Federal Deposit Insurance Corporation, Washington, DC, for Plaintiff-Appellee-Cross-Appellant.

Before PORFILIO, ANDERSON, and TACHA, Circuit Judges.

TACHA, Circuit Judge.

The Federal Deposit Insurance Corporation (FDIC) brought this case to recover losses sustained by Universal Savings Association, F.A. (Universal), in trading financial futures and options between 1984 and 1986. The FDIC, as successor to the Federal Savings and Loan Insurance Corporation (FSLIC), Universal's receiver, filed suit against a number of parties, including the brokers who executed trades on Universal's behalf. One of the broker defendants settled, but the FDIC's case against the remaining defendants went to trial on theories of violations of the Commodities Exchange Act (CEA), common law fraud, and breach of fiduciary duty. The jury returned verdicts against the introducing broker, UMIC, and its sales representative, Alex Charles Denney, for breach of fiduciary duty, and against Denney for violating the CEA. The jury found in favor of the defendants on all other counts. Denney and UMIC now appeal the verdicts against them. The FDIC cross-appeals to recover prejudgment interest. We affirm in part and reverse in part.

I. BACKGROUND

Universal was a savings and loan located in Chickasha, Oklahoma. In early 1987, the Federal Home Loan Bank Board closed Universal and appointed the FSLIC as receiver. Subsequently, the FSLIC, which had acquired rights to all known and unknown claims against Universal's officers and directors and against persons who performed services on Universal's behalf, transferred those rights to the FDIC in its corporate capacity as manager of the FSLIC Resolution Fund. *See* 12 U.S.C. § 1821a(a) (requiring this transfer).

The conduct that is the basis for this action occurred several years earlier, beginning in March, 1984. At that time, Universal held a large quantity of Treasury bonds that were declining in value as a result of rising interest rates. Alex Charles Denney, an employee of UMIC, a full-service brokerage firm located in Memphis, Tennessee, made a presentation to Universal's board of directors on the use of futures and options to hedge against the risk of further interest rate increases.

Employing a hedging strategy is not unlike buying an insurance policy. For example, by purchasing long-term put options on Treasury bonds, an investor can hedge against potential losses in his bond portfolio. As interest rates rise, the value of the investor's bonds fall. A put option permits the investor to sell a commodity, in this case a bond, at a fixed price within a stated period. The investor pays a small fee to the person who agrees to accept the bond if it is offered at the fixed price. If interest rates rise, the market price of the bond falls, and the investor exercises his option, delivering the bond (*i.e.*,

the put) at a profit. This profit offsets at least some of the losses that the investor incurs in his bond portfolio because of the interest rate increase. On the other hand, if interest rates fall, the price of the bond rises, and the investor does not exercise the option; the investor has paid a relatively small price for security against an interest rate increase.

After Denney's presentation, the Universal board voted to institute the hedging program and opened a commodities account with Geldermann, the firm that executed the trade orders, and with UMIC, the "introducing broker." Universal signed a customer agreement specifying that the account was to be used only for hedging. UMIC policy also restricted the accounts of financial institutions to hedging. Furthermore, Denney and UMIC were aware that Universal was subject to federal regulations limiting speculative trading by insured institutions. Universal's board authorized Bryan Green to manage the hedging program. Green reported directly to Universal's president Arthur Wallace, among others. He worked closely with Denney and UMIC, relying on them for trading advice. Green eventually moved to Memphis, the location of UMIC's offices, in order to work even more closely with Denney and UMIC.

While Universal's account was open, however, trading in it was not limited to hedging. In an attempt to improve its cash position, Universal, at Green's direction, began to use its futures and options program to speculate. Rather than buying contracts to counterbalance its bond holdings, Universal bought contracts that increased its exposure to interest rate fluctuations. Speculative trading increased steadily during the two years the account

was open. In the end, only one-fifth of the 73,000 commodities contracts traded in Universal's account were hedge trades. The speculative trading in Universal's account resulted in losses of $6.2 million, over $3.4 million of which constituted commissions to Denney, UMIC, and Geldermann.

The FDIC instituted this action to recover those losses from Denney, UMIC, Geldermann, Wallace, Green, and Gregg Crosby, a former officer of a Universal subsidiary. Prior to trial, the FDIC dismissed all claims against Crosby and its breach of fiduciary duty claims against Geldermann. On the first day of trial, Geldermann settled for $600,000 on the FDIC's remaining claim against it. At the conclusion of the trial, the jury awarded the FDIC damages of $288,000 against Denney for violating the CEA, $288,000 against Denney for breach of fiduciary duty, and $624,000 against UMIC for breach of fiduciary duty. In a post-trial motion, UMIC and Denney sought to reduce the judgment against them by the amount already paid to the FDIC in related settlements: $600,000 from the Geldermann settlement and $725,000 from a settlement in a prior FDIC action against Universal's board of directors for their conduct in managing Universal. The district court denied that motion. The FDIC then moved for prejudgment interest on the damages award under 12 U.S.C. § 1821(l), but the district court denied that motion also.

II. DISCUSSION

Denney and UMIC appeal the judgments against them. They raise five issues on appeal, arguing that: (1)

they are entitled to credits for the two previous settlements; (2) the FDIC's claims were barred by the statute of limitations; (3) the district court should have considered the defenses of ratification, waiver, and estoppel; (4) no fiduciary duty was ever established between Universal and its brokers; and (5) the FDIC's CEA claims against UMIC and Denney fail as a matter of law. The FDIC cross-appeals to recover prejudgment interest.

A. Credit for Prior Settlements

The defendants assert that the Geldermann settlement with the FDIC and the Universal directors' settlement with the FDIC must be applied as credits against the jury awards against Denney and UMIC. The defendants base their argument on the "one-satisfaction rule." *See U.S. Industries, Inc. v. Touche Ross & Co.*, 854 F.2d 1223, 1236 (10th Cir. 1988). Because a party is entitled to only one satisfaction, "[w]hen a plaintiff receives an amount from a settling defendant, . . . it is normally applied as a credit against the amount recovered by the plaintiff from a non-settling defendant, provided both the settlement and the judgment represent common damages." *Id.* The one-satisfaction rule "applies only where the defendants' conduct resulted in a single injury." *Touche Ross*, 854 F.2d at 1236.

The jury's award and the two earlier settlements do not represent common damages for a single injury. Rather, we conclude that the jury awarded damages against Denney and UMIC only for the injuries that they caused. In making this determination, we examine the

instructions that the district court gave the jury. Instruction number 40 is particularly relevant. That instruction read:

> Consider Each Defendant Separately
>
> As the plaintiff sues several defendants in this case and claims that each is liable to it in damages, the jury is instructed that it must consider separately the liability of each defendant to the plaintiff under the evidence and the Court's instructions as to the law of the case. The fact that one defendant may be found liable to the plaintiff should not control your verdict with respect to the other defendant unless the jury finds, under the evidence and these instructions, that the plaintiff has also proven its case against the other defendant.

Appellant's App. at 295. Universal allegedly sustained losses of $6.2 million from its venture into the futures and options market. More than half of those losses were paid in commissions to Geldermann, UMIC, and Denney. The remainder of the losses represent a decrease in the value of Universal's futures and options account with UMIC. Presented with this information, including the specific amount of commissions each defendant received, the jury returned its verdict after "consider[ing] separately the liability of each defendant." *Id.*

The verdict forms that the jury returned demonstrate that it understood its task. *See* Appellant's App. at 393-403. On the last page of "Verdict Form III: Commodity Exchange Act Claims," in the space for fixing the dollar amount of compensatory damages, the jury wrote,

"$288,000.00 against Charles Denney." On the last page of "Verdict Form III: Claims of Fraud and Breach of Fiduciary Duties," in the damages space, the jury wrote, "an additional $288,000.00 against Charles Denney and $624,000.00 against UMIC."

The jury returned a damages award specific to each defendant. It did not attempt to award damages for the total losses that Universal incurred through the unauthorized futures and options trading. Thus, there is no basis for us to conclude that the prior settlements with Geldermann and the Universal directors cover any portion of the damages assessed against Denney and UMIC. *See Touche Ross & Co.*, 854 F.3d at 1261 ("[A] party seeking credit for an amount received in settlement bears the burden of proving that the damages assessed against him have . . . been previously covered in a prior settlement."). The jury's award and the prior settlements do not constitute common damages.

B. Statute of Limitations Defense

The defendants raise a statute of limitations defense, asserting that the FDIC's claims are barred because the limitations period began running more than two years before February 13, 1987, the date that Universal went into receivership. After trial, the defendants made this argument to the district court in a motion for judgment as a matter of law, *see* Fed.R.Civ.P. 50(b); Appellant's App. at 230, which the district court denied. We review de novo the district court's denial of a Rule 50(b) motion, applying the same standard as the district court. *See Mason v. Oklahoma Turnpike Auth.*, 115 F.3d 1442, 1450 (10th Cir.

1997). Under that standard, we must hold in favor of the defendants if there is no legally sufficient evidentiary basis for a reasonable jury to have found that the statute of limitations barred the FDIC's claims in this action. *See id.*

When a financial institution enters receivership, federal law gives the FDIC three years from the date of receivership to file suit on the institution's behalf so long as the asserted claims are still alive under the applicable statute of limitations. 28 U.S.C. § 2415. There is no question in this case that the FDIC filed suit within three years of its becoming the receiver of Universal on February 13, 1987. The only question is whether the FDIC's claims were time-barred on that date. Here, the applicable statute of limitations on both the state law breach of fiduciary duty claims and the federal CEA claims is two years. Okla. Stat. tit. 12, § 95(3) (Supp. 1997); 7 U.S.C. § 25(c).

The two-year period under the CEA begins to run when trading ceases in an account in which unauthorized trades occurred. *See Indemnified Capital Invs. v. R.J. O'Brien & Assocs.*, 12 F.3d 1406, 1411 (7th Cir. 1993). Here, trading in Universal's account did not cease until 1986, and thus, there is no question that the limitations period had not expired when Universal went into receivership.

Under Oklahoma law, the two-year period for the breach of fiduciary duty claims does not begin to run until the wrongdoing has been or, in the exercise of reasonable diligence, should have been discovered. *See Resolution Trust Corp. v. Grant*, 901 P.2d 807, 813 (Okla. 1995). The limitations period may be tolled if an agent charged with informing his principal of unauthorized

acts fraudulently conceals the wrongdoing from his principal. *See Stephens v. General Motors Corp.*, 905 P.2d 797, 799 (Okla. 1995) (quoting *Kansas City Life Ins. Co. v. Nipper*, 51 P.2d 741 (Okla. 1935)). Where there has been fraudulent concealment of actionable wrongdoing, the statute of limitations begins to run when the wrongdoing is actually discovered. With respect to the breach of fiduciary duty claims, then, the question is whether the FDIC presented sufficient evidence to support a factual finding that (1) Universal's board of directors did not discover the unauthorized trading before February 13, 1985 and could not have done so even in the exercise of reasonable diligence before February 13, 1985, or (2) the unauthorized trading was fraudulently concealed from Universal's board of directors such and they did not discover the unauthorized trading until after February 13, 1985.

According to the defendants, Universal should be deemed to have had full knowledge, prior to February 13, 1985, of the speculative trading because Wallace and Green had daily involvement in the trading, both were officers of Universal, and neither one fraudulently concealed the nature of the trading from the board of directors. The FDIC responds by arguing that the jury made a finding that this suit was timely and that the evidence supports that finding. The district court instructed the jury on the defendants' statute of limitations defense. Appellant's App. at 293-94 (Instruction No. 39). That instruction fairly represented Oklahoma law.

From the record we have before us, it does not appear that the district court required the jury to provide a written verdict on the statute of limitations defense.

Nevertheless, because the jury returned a verdict in favor of the FDIC on some of its claims, it implicitly rejected the defense and made one of the above-mentioned factual findings.

Because we conclude that there was sufficient evidence to support both of those findings, we reject the defendants' statute of limitations defense. Unauthorized trading continued until April, 1986. Each of the directors who testified stated that Universal's board never authorized speculative trading. UMIC and Denney presented no evidence that the board authorized speculative trading. In fact, Green testified that he had never seen any board resolution authorizing such trading.

In addition, there is no evidence that Wallace or Green ever affirmatively informed the board of directors that Universal was engaging in speculative trading. The defendants counter that the board received information regarding speculative trading from independent sources, and therefore, it should have discovered the unauthorized trading before February 13, 1985. Those sources include, among others, written confirmations of specific trades, monthly reports of trading activity, detailed ledgers of trading activity, and monthly and quarterly reports to the Federal Home Loan Bank Board (FHLBB). The nature of these sources, however, would not indicate to the reader that the trading was speculative unless the reader of those sources had a sophisticated understanding of the futures and options commodities market. The evidence fully supports the conclusion that

none of the directors possessed that sophisticated knowledge. Thus, there was sufficient evidence for a jury finding that Universal's board of directors did not know and could not have discovered the unauthorized trading.

Furthermore, as officers of Universal, Wallace and Green could only take actions that were authorized by the board of directors. Sufficient evidence was presented at trial for the jury to conclude that Wallace and Green approved transactions that they knew the board had not authorized and that they then failed to adequately inform the board of these facts. The jury could reasonably have treated this nondisclosure as fraudulent because the district court instructed the jury that nondisclosure may constitute fraud if, "[w]hen dealing with another, a person has a duty to disclose a material fact . . . known to him and . . . he knows the fact is peculiarly within his knowledge and the other person is not in a position to discover the fact for himself. . . . " Appellant's App. at 263-64 (Instruction No. 17). The defendants do not challenge this instruction, and therefore, we treat it as a correct statement of the law. We also conclude that sufficient facts existed for a jury to find that Wallace and Green fraudulently concealed their knowledge of the speculative trading despite a duty to disclose. Accordingly, the defendants' statute of limitations defense fails.

We note that although the jury could have found that Wallace and Green fraudulently concealed their knowledge of the speculative trading from Universal's board of directors, the jury also found in their favor on the FDIC's claims against them. We express no opinion on this possible inconsistency because the defendants do not raise that

issue on appeal. *See State Farm Fire & Cas. Co. v. Mhoon*, 31 F.3d 979, 984 n. 7 (10th Cir. 1994).

C. Ratification, Waiver, and Estoppel Defenses

The defendants next argue that the district court erred (1) in not directing a verdict[1] in their favor based on the defenses of ratification and waiver, and (2) in failing to instruct the jury on the defenses of ratification, waiver, and estoppel.

Because the defendant did not meet the evidentiary threshold to justify a jury instruction on these defenses – which is much lower than that required for a directed verdict – we reject both arguments. Although state law would have governed the substance of the proposed instructions, federal law determines whether the denial of the jury instructions was proper. *See Dillard & Sons Const. Inc. v. Burnup & Sims Comtec, Inc.*, 51 F.3d 910, 915 (10th Cir. 1995). Jury instructions should be given only if they are supported by competent evidence. *See Farrell v. Klein Tools, Inc.*, 866 F.2d 1294, 1297 (10th Cir. 1989). Our cases are not in complete accord on the proper standard under which to review a district court's determination that a party has not presented sufficient evidence to justify a jury instruction. *Compare United States v. Wolny*, 1998 WL 2480, at *8 (10th Cir. Jan. 6, 1998) (suggesting

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[1] Although the current version of Rule 50 uses the term "judgment as a matter of law" rather than "directed verdict," the difference is in name only; there is no difference in substantive meaning between the two terms. *See* Fed.R.Civ.P. 50 advisory committee's note (1991).

review is de novo), *with Wilson v. Union Pacific Railroad Co.*, 56 F.3d 1226, 1232 (10th Cir. 1995) (suggesting review is for abuse of discretion). Nonetheless, because the district court's decision was correct even when reviewed de novo, we uphold it.

A successful ratification defense would require evidence that Universal's board intentionally treated the unauthorized speculative trading as authorized, or knowingly accepted the benefits of such unauthorized trading. *See Outboard Marine Ctr. v. Little Glasses Corp.*, 338 P.2d 1101, 1104 (Okla. 1959). A successful estoppel defense would require evidence that the Universal board's words or conduct led the defendants to believe that the trading in the UMIC account was authorized and that the defendants changed their position on the basis of the board's words or conduct to their detriment. *See Bay Petroleum Corp. v. May*, 264 P.2d 734, 736 (Okla. 1953). A successful waiver defense would require evidence that Universal's board intentionally relinquished the right to complain about the speculative trading. *See id.* at 736. There was simply no evidence presented at trial to support any of these three defenses.

As we stated above, none of the members of the board of directors possessed a sophisticated knowledge of the futures and options commodities market. Further, it is undisputed that the board never adopted any resolution authorizing trading for speculative purposes. While the evidence suggests that some of the directors knew that the trading in the UMIC account would earn Universal profits, this could not lead one to conclude that the board knew or approved of the speculative trading.

Indeed, the design of the hedging strategy that the Universal's board adopted was to earn profits in case rising interest rates cut further into the value of Universal's bond portfolio. There was no evidence presented that the board knew and understood that speculative, non-hedge trading was occurring. Accordingly, there was no evidence to support a finding of the defenses of ratification, estoppel, or waiver. The district court properly denied the defendants' directed verdict motion and proposed jury instructions.

D. Breach of Fiduciary Duty Claims

The defendants assert that the district court erred in denying their motion for judgment as a matter of law on the breach of fiduciary duty claims against UMIC and Denney. Furthermore, the defendants argue that even if there was sufficient evidence to send those claims to a jury, the district court committed reversible error by failing to properly instruct the jury on the burden of proof required to establish a fiduciary duty.

"We review de novo the district court's determination of a motion for judgment as a matter of law, applying the same standard as the district court." *Mason v. Oklahoma Turnpike Auth.*, 115 F.3d 1442, 1450 (10th Cir. 1997). Judgment as a matter of law is appropriate only if no reasonable juror could find in favor of the opposing party. *See id.* We review the evidence and all reasonable inferences drawn from that evidence in the light most favorable to the jury's verdict. *See MidAmerica Fed. S&L v. Shearson/American Express*, 886 F.2d 1249, 1251 (10th Cir. 1989).

The defendants base their argument on the fact that there was insufficient proof that they were fiduciaries of Universal. Under Oklahoma law, a fiduciary relationship exists whenever trust is placed by one person in the "integrity and fidelity" of another. *In re Beal*, 769 P.2d 150, 154 (Okla. 1989). The relationship is based on either an express or implied agreement where it can be said the minds have met to create a mutual obligation. *See Lowrance v. Patton*, 710 P.2d 108, 111-12 (Okla. 1985). Before a court will declare a relationship fiduciary, there must be a weakness on one side and a strength on the other, resulting in trust justifiably reposed in the other. *See Beal*, 969 P.2d at 155.

From the day that Denney made his March 1984 presentation to the Universal board, he held himself and his company, UMIC, out as experts in financial commodities trading. There was testimony that Denney provided substantial guidance to Green and Wallace in trading in Universal's account at UMIC. Denney and UMIC did not just execute trade orders at the direction of Universal's officers. They actively provided advice and direction to Universal. These facts provide sufficient evidence from which a reasonable jury could conclude that the defendants owed Universal fiduciary obligations.

We next turn to the defendants' assertion that the district court should have instructed the jury that the existence of a fiduciary duty had to be established by clear and convincing evidence. "[W]e conduct a de novo review to determine whether, as a whole, [the jury instructions] correctly state the governing law and provided the jury with an ample understanding of the issues

and applicable standards." *Harrison v. Eddy Potash, Inc.*, 112 F.3d 1437, 1442 (10th Cir. 1997) (citations omitted).

The only case that the defendants rely upon for their proposed clear and convincing standard of proof is *Devery Implement Co. v. J.I. Case Co.*, 944 F.2d 724 (10th Cir. 1991). In that case, the district court instructed the jury that it had to find by clear and convincing evidence that a fiduciary relationship existed between two parties that had entered into a dealership agreement. Because neither party to the appeal objected to the instruction, this court reviewed only for plain error. *See United States v. Voss*, 82 F.3d 1521, 1530 (10th Cir.), *cert. denied*, 117 S.Ct. 226 (1997). We merely determined that the instruction "provided the jury with a reasonable picture of the Oklahoma requirements for a fiduciary relationship," particularly in light of the fact that a "fiduciary relationship is atypical in a contract setting." *Id.* at 731. This case does not involve such an atypical setting, and thus, we conclude that there is no need for the higher threshold for finding a fiduciary relationship between Universal and the defendants. The district court did not err in instructing the jury about breach of fiduciary duty.

E. CEA Claims

Denney finally argues that the district court erred in refusing to grant it judgment as a matter of law on FDIC's fraud claims against him under sections 4b and 4c(b) of the CEA. As stated above, we review the district court's denial de novo. *See Mason*, 115 F.3d at 1450. Judgment as a matter of law is appropriate only if no reasonable juror could have found in favor of the FDIC. *See id.* We review

the evidence in the light most favorable to the jury's verdict. *See MidAmerica Fed. S&L*, 886 F.2d at 1251.

Section 4b of the CEA provides, in relevant part:

> It shall be unlawful . . . for any person, . . . *in connection with* any order to make, or the making of, . . . any contract of sale of any commodity *for future delivery* . . . on behalf of any other person if such contract for future delivery is or may be used for (A) hedging any transaction in interstate commerce in such commodity . . . (i) to cheat or defraud or attempt to cheat or defraud such other person; (ii) willfully to make or cause to be made to such other person any false report. . . .

7 U.S.C. § 6b(a)[2] (emphasis added). Section 4c(b) of the CEA and the corresponding rules promulgated by the Commodities Futures Trading Commission contain similar prohibitions with reference to commodity option contracts. *See* 7 U.S.C. § 6c(b); 17 C.F.R. §§ 32.9 & 33.10 (1997).[3]

Denney asserts that the record does not contain evidence from which a jury could determine that, "in connection with" an order of the sale of a futures contract, he misrepresented material facts and executed unauthorized trades and that Universal relied upon his misrepresentations. The "in connection with" language of section 4b of

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[2] Except for minor changes that are not relevant here, section 4b of the CEA is the same today as it was in 1984.

[3] There have been no significant changes to either the statutory section or the regulations promulgated thereunder since 1984.

the CEA requires the alleged fraud to concern the fundamental nature of the futures contract; that is, the fraud must involve the quality of or the risks associated with the investment.[4] *See Kearney v. Prudential-Bache Securities, Inc.*, 701 F.Supp. 416, 424, 425 (S.D.N.Y. 1988) (citing Rule 10b-5 cases in which brokers' representations were actionable because they led investors to believe that broker had proper experience and financial stability to handle account or that investments were less risky than they actually were). Evidence was presented at trial that Universal's board of directors relied on Denney's representations at the March 1984 presentation. At the presentation, Denney and other UMIC personnel explained to Universal's board how a low-risk hedging program using financial futures and options could help the S&L offset large potential losses in its treasury bond portfolio. Although the board only authorized hedge trades, Denney recommended and executed high risk trades that he knew were speculative. There was also evidence that Universal's board did not have a sophisticated understanding of the commodities market.

Statements about the risk associated with a particular investment are "in connection with the making" of that investment because they concern the basic question of whether or not a person should invest her money. *See Saxe*, 789 F.2d at 110 (holding that misrepresentations

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[4] We note that courts faced with interpreting the anti-fraud provisions of the Commodities Exchange Act look to the more developed body of law addressing section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 promulgated thereunder. *See Saxe v. E.F. Hutton & Co.*, 789 F.2d 105, 109 (2d Cir.1986).

regarding the type of trading for which a client's funds would be used is actionable under the CEA). Denney did not have merely peripheral contact with Universal and its futures and options account. He promoted the hedging program, made recommendations to Universal's management, supervised the trading activity in the account, and executed orders on Universal's behalf.

To counter the assertion that he never executed unauthorized trades and that Universal did not rely upon his alleged misrepresentations, Denney asserts that he merely implemented the decisions of Universal's managers in charge of the hedging account, Wallace and Green. This assertion is contradicted by evidence that demonstrates that Denney was actively involved in Universal's hedge account and made speculative trade recommendations almost daily, most of which Wallace and Green followed. This case is not one of a detached broker who, while sitting in his office one day, received a call from a client who wanted to make a couple of investments. This case involved an aggressive campaign, clothed as a low-risk hedge program, to trade speculatively in the commodities market, with the possibility of huge return but with the concomitant risk of huge losses. We find that sufficient evidence existed to support the jury's verdict on the CEA claims.

F. Prejudgment Interest

Following the jury's damages award, the FDIC sought prejudgment interest under section 1821(l) of the Financial Institutions Reform, Recovery, and Enforcement

Act of 1989 (FIRREA). That section provides, in relevant part:

> In any proceeding related to any claim against [an S&L's] director, officer, . . . or any other party employed by or providing services to [the S&L], recoverable damages determined to result from the improvident or otherwise improper use or investment of [the S&L's] assets shall include principal losses *and appropriate interest*.

12 U.S.C. § 1821(l) (emphasis added). The district court held that section 1821(l), enacted four months after this suit was filed, should not be applied to this case. *See* Order, at 7 (May 31, 1995). We affirm that finding, and hold that prejudgment interest cannot be awarded under section 1821(l) when the conduct upon which the judgment is based occurred before enactment of FIRREA.

The Supreme Court's decision in *Landgraf v. USI Film Products*, 114 S.Ct. 1522 (1994), set forth the basic calculus for analyzing whether a court should apply newly enacted legislation to a pending case. The first question is whether Congress has expressly prescribed the law's temporal reach. *See Lennox v. Evans*, 87 F.3d 431, 432 (10th Cir. 1996) (applying *Landgraf*), *rev'd on other grounds by United States v. Kunzman*, 125 F.3d 1363 (10th Cir. 1997). If Congress has included an express command in the statute, that command governs the question. *See Landgraf*, 114 S.Ct. at 1505.

If no express command exists, *Landgraf* directs the court to ask a second question: does the statute have "retroactive effect"? *See Landgraf*, 114 S.Ct. at 1505. If it does have such an effect, the court cannot apply the law

to the case before it. A statute does not have retroactive effect merely because it is applied to conduct, or a complaint, that predates the law's enactment. *See id.* Rather, a new statute has "retroactive effect" when applied to a pending case "if 'it would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed.' " *Id.* The Supreme Court recently reaffirmed *Landgraf*'s holding and underscored that there exists a strong presumption against retroactivity. *See Hughes Aircraft Co. v. United States,* 117 S.Ct. 1871, 1876 (1997); *Lindh v. Murphy,* 117 S.Ct. 2059, 2062 (1997).

The Supreme Court in *Lindh* did not strictly follow the *Landgraf* calculus. Nor did it, however, alter *Landgraf*'s holding or general applicability to retroactivity determinations. In *Lindh,* the Court examined whether Chapter 153 of the Anti-Terrorism and Effective Death Penalty Act (AEDPA) applies to cases pending at the time of its enactment. After concluding that Chapter 153 does not contain an express command regarding its temporal reach, the Court drew the following negative inference: because Chapter 154 of the AEDPA includes an express command that its provisions should apply to pending cases and because Congress passed Chapters 153 and 154 simultaneously, the absence of such a command in Chapter 153 means that Congress intended for Chapter 153's provisions to apply only to subsequently filed cases. *See id.* at 2063-2068.

Lindh merely clarified that *Landgraf* does not make traditional rules of statutory construction completely irrelevant to retroactivity problems. *See Lindh,* 117 S.Ct. at

2063. If the district court, using normal rules of construction, can conclude that a statute should not be applied to the case before the court, there is no need to address *Landgraf*'s question of whether the statute would have a retroactive effect. *See Lindh*, 117 S.Ct. at 2063 ("Although *Landgraf*'s default rule would deny application when a retroactive effect would otherwise result, other construction rules may apply to remove even the possibility of retroactivity. . . . "); *United States v. Perez*, 129 F.3d 255, 259 (2d Cir. 1997) (interpreting *Lindh* to mean that "[i]f the customary rules of statutory construction suggest that a new provision does not apply, the new provision is inapplicable.").

In essence, *Lindh* adds one step to the *Landgraf* test to produce a three-part test. In the first step, as stated above, the court determines whether Congress included an express statement in the statute regarding its temporal reach. *See Landgraf*, 114 S.Ct. at 1505. If Congress has expressly addressed the question, the analysis is over. If not, the court proceeds to the second step and employs normal rules of statutory interpretation to determine whether the statute should be applied to the case before the court. *See Lindh*, 117 S.Ct. at 2063. If the court determines, even after employing these interpretive techniques, that Congress did not address the temporal reach of the statute, the court must then proceed to *Landgraf*'s question of whether the statute would have retroactive effect. *See Landgraf*, 114 S.Ct. at 1505.

We now apply the *three*-step *Landgraf/Lindh* test. Under step one, it is clear that FIRREA, and section 1821(l) in particular, contains no express command regarding its applicability to pending cases. *See Oklahoma*

Radio Associates v. FDIC, 987 F.2d 685, 696 (10th Cir. 1993). Under step two, we conclude that FIRREA, unlike Chapter 153 of the AEDPA at issue in *Lindh*, is devoid of trustworthy indications from Congress regarding the statute's applicability to pending cases. Neither the text of the statute nor its structure speaks to the matter. Furthermore, "there appears to be a consensus among the courts that clear indications on retroactivity cannot be found in the legislative history." *Id.* (collecting cases).

Because the usual modes of statutory construction do not shed light on FIRREA's temporal reach, we necessarily turn to step three, the *Landgraf* retroactive effect question. *See Turkhan v. INS*, 123 F.3d 487, 489 (7th Cir. 1997); *In re Hanserd*, 123 F.3d 922, 934 (6th Cir. 1997). We must determine whether application of section 1821(l) in this case would give the law "retroactive effect." Denney and UMIC state that if the court applies section 1821(l) in this case, thereby imposing prejudgment interest on the damages they must pay the FDIC, the law would materially increase their liability for past conduct. Such a penalty, they argue, is inconsistent with *Landgraf*. The FDIC counters by asserting that prejudgment interest involves a procedural question that, although increasing the losing party's total liability, does not implicate that party's substantive rights or upset any settled expectations.

Prejudgment interest presents a difficult question for purposes of retroactivity analysis. *Cf. Landgraf*, 114 S.Ct. 1522, 1526 (Scalia, J., concurring) ("[A] statutory provision for attorney's fees presents a difficult case."). On the one hand, *Landgraf* states that a new statute has retroactive effect if it "increase[s] a party's liability for past

conduct." *Id.* at 1483. There is no question that imposing prejudgment interest on Denney and UMIC here will increase their liability, and that the compensatory damages on which the interest would be imposed are for conduct predating the enactment of FIRREA. It is immaterial that the prejudgment interest rule merely increases the liability of a party rather than making conduct unlawful that was lawful when it took place. "The *extent* of a party's liability, in the civil context as well as the criminal, is an important legal consequence that cannot be ignored." *Id.* at 1507. The Court has never "read a statute substantially increasing the monetary liability of a private party to apply to conduct occurring before the statute's enactment." *Landgraf,* 114 S.Ct. at 1507.

On the other hand, prejudgment interest is quite analogous to attorney's fees, and *Landgraf* reaffirmed a prior holding of the Court that an attorney's fee statute could be applied to a case pending during its enactment. *See Bradley v. Richmond School Board,* 416 U.S. 718, 724, *discussed in Landgraf,* 114 S.Ct. at 1502-03; *but see Landgraf,* 114 S.Ct. at 1523, 1526 (Scalia, J., concurring) ("I see nothing to be gained by overruling [*Bradley*], but neither do I think the indefensible should be defended"). Both attorney's fees and prejudgment interest provisions seem to increase a party's liability for past conduct (i.e., the conduct that is the subject of the lawsuit). They are both available only after the court has determined that the party is entitled, by virtue of some other law, to compensatory or injunctive relief.

In *Landgraf,* the Court gave two reasons why the attorney's fees statute at issue in *Bradley* did not have a "genuinely 'retroactive' " effect on the litigants. Neither

rationale applies to the prejudgment interest provision at issue in this case. The first reason given is that attorney's fees are " 'collateral to the main cause of action' and 'uniquely separable from the cause of action to be proved at trial.' " *Landgraf,* 114 S.Ct. at 1503 (quoting *White v. New Hampshire Dept. Of Employment Security,* 455 U.S. 445, 451-52 (1982)). Based on *White,* the Court found attorney's fees similar to procedural rules, which do not have a retroactive effect when applied to pending cases. *See Landgraf,* 114 S.Ct. at 1502-03. *White* held that a postjudgment motion for attorney's fees was not a motion to alter or amend judgment under Fed.R.Civ.P. 59(e). Central to *White*'s reasoning was the fact that attorney's fees have never been considered compensation for the conduct giving rise to the suit. *See White,* 455 U.S. at 452. However, "unlike attorney's fees, which at common law were regarded as an element of costs and therefore not part of the merits judgment, prejudgment interest traditionally has been considered part of the compensation due plaintiff." *Osterneck v. Ernst & Whinney,* 489 U.S. 173, 175 (1989) (citation omitted) (holding that a postjudgment motion for attorney's fees is a motion to alter or amend judgment under Fed. R. Civ. P 59(e)). Thus, because prejudgment interest, unlike attorney's fees, is tied so intimately to the substance and merits of the case itself, *see id.,* it cannot be said that it belongs to the family of procedural rules.

Secondly, the *Landgraf* Court pointed out that the award of attorney's fees under the new statute did not increase the defendants' liability because the attorney's fees award was justified under pre-existing common law rules. *See Landgraf,* 114 S.Ct. at 1503 (discussing *Bradley,* 416 U.S. at 721). In fact, the Court intimated that the trial

court would have abused of its discretion if it had refused to award attorney's fees under the common law theory. *See id.* at 1503 ("[I]t would be difficult to imagine a stronger equitable case for an attorney's fees award than a lawsuit in which the plaintiff parents would otherwise have to bear the costs of desegregating their children's public schools."). In this case, the prior availability of prejudgment interest is much less clear.

In the absence of FIRREA, state law governs the availability of prejudgment interest on the breach of fiduciary duty claim. *See FDIC v. Oldenburg*, 34 F.3d 1529, 1538 (10th Cir. 1994). Oklahoma allows recovery of prejudgment interest on "damages certain, or capable of being made certain by calculation." Okla. Stat. Ann. tit. 23 § 6 (West 1987). While judicial interpretations of this language do not preclude the FDIC from recovering under the statute, it is not clear, as it was in *Bradley*, that a district court would abuse its discretion by refusing to grant the award. *See Liberty Nat'l Bank & Trust Co. v. Acme Tool Div.*, 540 F.2d 1375, 1383 (10th Cir. 1976) (noting that Oklahoma courts do not award interest when a trial is necessary to determine the amount due). In the absence of FIRREA, the federal rule on prejudgment interest governs the CEA claim. *See Touche Ross*, 854 F.2d at 1254. Like the grant of interest under Oklahoma law, it is discretionary, and we cannot say with certainty that the district court's decision would have gone one way or the other.

Thus, neither of the two reasons that the *Landgraf* Court gave for applying an attorney's fee statute to a pending case applies to prejudgment interest. A prejudgment interest award not only substantially increases monetary liability for proscribed conduct, but it is also very

closely tied to the amount of harm done by that conduct. It has all the indicia of a substantive rule that cannot be applied retroactively without an instruction from Congress, either in the form of an express command or as determined by the court through traditional statutory construction, to do so. Therefore, FIRREA's prejudgment interest provision cannot be applied in this case because the conduct giving rise to prejudgment interest liability occurred before the passage of FIRREA.

Thus, we agree with the district court's conclusion on the applicability of FIRREA to this case, but we find fault with the court's subsequent legal conclusions. Because FIRREA is inapplicable, the district court was charged with deciding whether prejudgment interest was available under pre-existing law. The opinion below summarily denied the FDIC's motion for prejudgment interest on the grounds that "[t]he FDIC offers no persuasive authority that would require the adoption of a federal common law rule governing prejudgment interest in this case." This reasoning is misguided for two reasons. We address separately the implications of the district court's statement for the state law claims and the federal claims.

First, the district court's statement is incorrect as applied to the state law breach of fiduciary duty damages awards because we must look to state law, not federal law, in determining whether to award prejudgment interest on state law claims. *See Oldenburg*, 34 F.3d at 1538; *Touche Ross*, 854 F.2d at 1254-55. On remand, the district court must determine whether prejudgment interest should be imposed under Oklahoma law on those jury awards.

Second, with respect to the federal CEA damages award, contrary to the district court's assertions, our precedents do establish that prejudgment interest normally should be awarded on successful federal claims. *See, e.g., Kleier Advertising, Inc. v. Premier Pontiac Inc.*, 921 F.2d 1036, 1040-42 (10th Cir. 1990). "[A]n award of prejudgment interest under federal law is governed by a two-step analysis." *Touche Ross*, 854 F.2d at 1257. First, the trial court determines whether prejudgment interest would compensate the injured party or duplicate damages already awarded. *See id.* If the award would compensate, the "court must still determine whether the equities would preclude the award of prejudgment interest." *Id.* On remand, the district court must engage in the analysis required by *Touche Ross* to determine whether prejudgment interest should be awarded to the FDIC on the successful CEA claim against Denney.

III. CONCLUSION

Because the district court correctly concluded that the defendants are not entitled to credit for any prior settlements; that the FDIC's claims were not barred by the statute of limitations; that no evidence was presented at trial to support the defenses of ratification, waiver, or estoppel; and that sufficient evidence was presented at trial to support the jury's verdict on both the federal CEA claim and the state law breach of fiduciary duty claims, the district court's determinations on those issues are AFFIRMED.

Because we conclude that application of 12 U.S.C. § 1821(l) in this case would have an impermissible retroactive effect, we agree with the district court's conclusion that section 1821(l) does not apply to this case, but we disagree with the court's conclusion that there is no preexisting law on whether the FDIC is entitled to prejudgment interest. Accordingly, we VACATE the district court's denial of prejudgment interest and REMAND for findings on that issue under the appropriate state and federal law, as outlined in this opinion.

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

FEDERAL DEPOSIT INSURANCE CORPORATION, as manager of the FSLIC Resolution Fund, Plaintiff, vs. GELDERMANN, INC., et al., Defendants.	)	NO. CIV-89-609-T (Filed May 31, 1995)

ORDER

Before the court is the motion for prejudgment and post-judgment interests of the Federal Deposition Insurance Corporation ("FDIC") and the motion of defendants UMIC, Inc. ("UMIC") and Charles Alex Denney ("Denney") to settle the amount of the judgment to be awarded in favor of the FDIC and against UMIC and Denney pursuant to the jury verdict rendered on September 2, 1994. In their verdict, the jury found in favor of the FDIC and against defendant Denney on the plaintiff's claim alleging violations of §§ 4b and 4c(b) of the Commodities Exchange Act (the "Act"). The jury awarded damages in the amount of $288,000.00 for violations of the Act. The jury also found in favor of the FDIC and against Denney on plaintiff's claim of breach of fiduciary duty by Denney, and in favor of the FDIC and against Defendant UMIC on its claim of breach of fiduciary duty by UMIC. Although the verdict form did not ask the jury to identify the defendant against whom damages were awarded, the

jury added language specifying that damages for violations of the Act were awarded against defendant Denney and that damages on the breach of fiduciary duty claims were awarded against UMIC and against Denney.

Defendants UMIC and Denney have filed a motion to "settle judgment" in which they seek to offset the amount of prior settlements with other defendants against the verdicts rendered. The FDIC has filed a motion for entry of judgment in which it seeks prejudgment and post-judgment interest. In their response to that motion, defendants UMIC and Denney argue that prejudgment interest is not available, and they further argue that the damages awarded against defendant Denney and UMIC should be reduced. Further, defendants incorporate their argument, set forth in the separate motion, that the amount of the judgment should be reduced according to the amounts received by the FDIC pursuant to settlement agreement.

Because the parties' motions raise similar issues, all will be addressed in this order. Therefore, the issues before the court are: (1) whether the total dollar damages awarded against defendant Denney should be reduced; (2) whether the damages awarded against UMIC should be reduced by the amount of damages awarded against defendant Denney; (3) whether the total judgment should be reduced according to the amount received by the FDIC from settlements with other parties; and (4) whether the FDIC is entitled to prejudgment and post-judgments interest.

DAMAGES AWARDED AGAINST DEFENDANT DENNEY

Of the four defendants against whom the FDIC proceeded at trial,[1] the jury found in favor of defendants Arthur A. Wallace and Bryan F. Green on all claims asserted by the FDIC. The jury found in favor of the FDIC and against defendant Denney on two claims arising under the Act and on a breach of fiduciary duty claim. They also found in favor of the FDIC and against defendant UMIC on a breach of fiduciary duty claim. The verdict forms allowed the jury to determine liability as to each defendant on each of the claims asserted by the FDIC. The damages issues raised by Denney and UMIC relate only to the jury's findings on Verdict Forms IIIA and IIIB. All claims arising under the Act were set forth on Verdict Form IIIA; it contained a separate portion for the award of compensatory damages, if any, resulting from those claims. Verdict Form IIIB contained all fraud and breach of fiduciary duty claims; it also included a separate portion for the award of any resulting compensatory damages and a separate section for punitive damages. The jury was told that the damages portions on each of the forms were to be completed only in the event that any defendant were found liable to the FDIC on the applicable claim. The jury was not asked to identify the defendant against whom the damages were assessed; they were asked only to identify the total amount of compensatory damages on all claims arising under the

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[1] Prior to trial, the FDIC dismissed its claims against defendant Gregg Crosby, and, pursuant to a settlement agreement, dismissed its claims against Geldermann, Inc.

Act and the total amount on the fraud and fiduciary duty claims. The jury found in favor of the FDIC on its claims that Denney violated §§ 4b and 4c(b) of the Act.[2] The jury awarded damages of $288,000.00, and added the phrase, "against Charles Denney." On the claim for breach of fiduciary duty, the jury found in favor of the FDIC and against Denney and in favor of the FDIC and against UMIC.[3] In the portion of the verdict form pertaining to damages on that claim, the jury initially wrote, "$288,000.00 against Charles Denney and $624,000.00 against UMIC."[4]

Defendant Denney argues that, rather than adding the two $288,000.00 damage awards for total damages of $576,000.00 against him, the judgment should reflect one damage award of $288,000.00. Denney correctly notes that, where the plaintiff asserts two claims based on separate theories of recovery and does not prove that his theories produce distinct damages, he cannot recover damages under both. *U.S. Industries, Inc. v. Touche Ross*, 854 F.2d 1223, 1259 (10th Cir. 1988); *Clappier v. Flynn*, 605

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[2] The FDIC asserted claims under these sections of the Act against each defendant; the jury found in favor of all defendants except Denney. The jury found in favor of each defendant on the remaining claims arising under the Act.

[3] The jury found in favor of all other defendants on the breach of fiduciary duty claim and in favor of all defendants on common law fraud claims.

[4] As discussed *infra*, the jury returned to deliberate, with the consent of counsel, to clarify the total damages to be awarded against Denney. They did so and revised the verdict form to read "an additional $288,000 against Charles Denney and $624,000 against UMIC."

F.2d 519, 529 (10th Cir. 1979). Defendants contend the FDIC did not prove separate and distinct damages resulting from violations of the Act and from breach of fiduciary duty and that awarding damages on each claim constitutes an improper double recovery.

It is apparent that the jury intentionally included two separate damages awards against defendant Denney, each in the amount of $288,000.00. The parties will recall that, when the jury returned the original verdict form listing the two dollar amounts on these two claims against Denney, the court conferred with counsel outside the jury's hearing as to whether the jury should be asked if they intended to award a total of $288,000.00 or $576,000.00 against Denney. With the consent of counsel, the court expressly asked to [sic] the jury to clarify this point. After continuing their deliberation, the jury revised the verdict form. They did not change the award of compensatory damages on violations of the Act in the amount of $288,000.00 against defendant Denney. In the damages portion of the verdict form for breach of fiduciary duty, however, the jury expressly stated that they were awarding "an additional $288,000.00 against Charles Denney." It is clear from the record that the jury awarded a total of $576,000.00 in damages against Denney.

That conclusion does not, however, end the inquiry. As defendants and UMIC note, the FDIC cannot have a double recovery if the total damages awarded were for a single injury asserted under two alternative theories of relief. That does not apply, of course, if the evidence is sufficient for the jury to find that a certain amount was attributable to Denney's breach of his Fiduciary duty and a separate amount was attributable to his violations of

the Act. In this case, the evidence established losses to Universal Savings & Loan in an amount substantially greater than the damages awarded. The evidence was such that the jury could reasonably have found that a specific type of wrongdoing caused some, but not all, of the damage. Therefore, it could reasonably conclude that Denney's violations of the Act caused a loss of a certain amount, while his breach of fiduciary duty caused additional losses. Therefore, the total $576,000.00 in damages awarded against Denney is supported by the evidence.

DAMAGES AWARDED AGAINST UMIC

Defendants next argue that any amount against defendant Denney should be deducted from the $624,000.00 in damages awarded against UMIC because the jury was instructed that, as a matter of law, UMIC is liable for the acts of its agent, Denney. Defendants argue that, as a result, the jury's $624,000.00 damage award against UMIC necessarily includes the damages awarded against Denney.

The FDIC contends that, because separate breach of fiduciary duty claims were asserted against all defendants, the claim asserted against UMIC was not limited to a breach based on the conduct of Denney. Rather, the FDIC alleged that UMIC was liable for breach of its own fiduciary duty and that such breach was separate and apart from the acts or omissions of Denney.

The court agrees that a separate cause of action for breach of fiduciary duty was asserted against UMIC and the jury heard evidence of same. Therefore, damages for its breach would be attributable to the conduct of UMIC.

The jury chose to go beyond the language of the verdict form and delineate that portion of the breach of fiduciary duty damages attributable to Denney and that attributable to UMIC. That result is consistent with the evidence. Accordingly, judgment against UMIC will be entered in the amount of $624,000.00.

RECOVERABILITY OF PREJUDGMENT AND POST-JUDGMENT INTEREST

Plaintiff contends prejudgment interests is mandatory under the Financial Institutions Reform, Recovery and Enforcement Act of 1989 ("FIRREA") because § 1821(1) of FIRREA provides in pertinent part:

> In a proceeding related to any claim against [a] . . . director, officer, employee, agent . . . or any other party employed by or providing services to an insured depository institution, recoverable damages . . . shall include principal losses and appropriate interest.

12 U.S.C. § 1821(1).

Defendants argue that this statute was not enacted at the time this lawsuit was filed and is not retroactive. Defendants note that, in its September 30, 1993 order, this court held that FIRREA would not be applied retroactively to this case.[5] Defendants also argue that retroactive application of § 1821(1) is precluded by *Landgraft v. USI Film Products*, ___ U.S. ___, 114 S. Ct. 1483 (1994), in which

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[5] Although this court so held in that order, that holding was in the context of substantive issues related to certain affirmative defenses and does not necessarily govern the issue of prejudgment interest.

the court held that the 1991 amendments to the Civil Rights Act allowing compensatory and punitive damages were not retroactive. In that decision, the court established the following analysis to determine whether a statute could be applied retroactively:

> When a case implicates a federal statute enacted after the events in suit, the court's first task is to determine whether congress has expressly prescribed the statute's proper reach. If congress has done so, of course, there is no need to resort to judicial default rules. When, however, the statute contains no such express command, the court must determine whether the new statute would have retroactive effect, i.e., whether it would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed. If the statute would operate retroactively, our traditional presumption teaches that it does not govern absent clear congressional intent favoring such a result.

114 S. Ct. at 1505.

Applying that analysis to the 1991 amendments to the Civil Rights Act, the court determined that those amendments created a right to compensatory and punitive damages which had not previously existed. Therefore, the amendments created a new right to monetary relief. The amendments contain no clear congressional direction that the statute was intended to be retroactive, and they increase a party's potential liability for past conduct. Therefore, the court found that the amendments would not be applied retroactively.

The FDIC notes that prejudgment interest is generally regarded as procedural rather than substantive. *See e.g., Benson v. Blair,* 515 P.2d 1363, 1365 (Okla. 1973). Because procedural matters not affecting substantive rights have been applied retroactively, the FDIC argues that the FIRREA prejudgment provision may be retroactive. The FDIC cites several decisions from other jurisdictions holding that certain other procedural aspects of FIRREA may be retroactively applied. *See Demars v. First Service Bank for Savings,* 907 F.2d 1237, 1239 (1st Cir. 1990). These decisions do not, however involve prejudgment interest. Neither the Supreme Court nor this circuit has addressed the retroactivity of § 1821(a) of FIRREA. The Tenth Circuit has determined that FIRREA contains no express statement indicating that Congress intended its retroactive application. *Oklahoma Radio Associates v. FDIC,* 987 F.2d 685, 696 (10th Cir. 1993). In the absence of persuasive authority, the court finds that FIRREA prejudgment provision should not be applied retroactively. Accordingly, prejudgment interest is not mandated by FIRREA.

In the alternative, the FDIC argues that prejudgment interest is available as a matter of federal common law and that the Supreme Court ruling in *O'Melveny & Myers v. FDIC,* ___ U.S. ___, 114 S. Ct. 2048 (1994) does not apply to prejudgment interest. In *O'Melveny,* which has been addressed by all parties in this case with regard to several issues the court found that there is no federal common law replacing state law rules governing the application of fraud by corporate officers where the FDIC is receiver.

The FDIC offers no persuasive authority that would require the adoption of a federal common law rule governing prejudgment interests in this case. Accordingly, the plaintiff's motion for prejudgment interest is denied. Post-judgment interest is, however, available and will be awarded in accordance with applicable rules.

APPLICATION OF PRIOR SETTLEMENTS TO REDUCE DAMAGES AWARDED TO PLAINTIFF

Defendants Denney and UMIC argue that the amount of damages awarded by the jury should be reduced in accordance with the settlements previously executed by the FDIC and defendant Geldermann in this lawsuit. They also argue that the damages should be further reduced by the settlement amount in a separate case, *FDIC v. Sevier, et al.*, No. CIV-87-2015-R, United States District Court, Western District of Oklahoma. ("Sevier Settlement"). Their argument is based on application of the pro tanto rule.

According to the pro tanto rule, when a plaintiff receives a settlement from one defendant, a non-settling codefendant is entitled to a credit of the settlement amount against any judgment obtained by the plaintiff against the non-settling defendants so long as both the settlement and the judgment represent common damages. *FDIC v. Geldermann, Inc.*, 975 F.2d 695, 699, n.6 (10th Cir. 1992), citing *Singer v. Olympia Brewing Co.*, 878 F.2d 596, 600 (2nd Cir. 1989), *cert. denied*, 493 U.S. 1024 (1990). However, the rule precludes credit where the settlement amount and the damages are based on two separate injuries. *U.S. Industries, Inc. v. Touche Ross & Co.*, 854 F.2d

1223, 1236 (10th Cir. 1988). A settling defendant cannot get credit for a settlement if it is applied to damages different from those which the plaintiff recovers at trial. *FDIC v. United Pacific Insurance Co.*, 20 F.3d 1070, 1083 (10th Cir. 1994).

The FDIC argues that UMIC and Denney are not entitled to any credit for previous settlements because those settlements did not involve damages common to those represented by the jury verdict. The FDIC contends that in *Sevier*, it sued individual directors of Universal for damages based on specific transactions during a time period entirely different from the transactions and period involved in this action. The individuals were sued for specific violations of the federal banking laws, while the judgment against UMIC and Denney was for claims based on common law breaches of fiduciary duty and violations of the Commodity Exchange Act. These claims were not asserted against the individual defendants in *Sevier*.

The court agrees that the Sevier Settlement amount and the damages in this case are not the same. Accordingly, defendants UMIC and Denney are not entitled to any credit for the Sevier Settlement.

The FDIC also argues that UMIC and Denney are not entitled to credit for the $600,000.00 settlement between plaintiff and Geldermann, Inc. in this case. The FDIC notes that, although it initially asserted a variety of claims against Geldermann based on the same state and federal law as those asserted against Denney and UMIC, it dropped all such claims except the Commodity Exchange Act claims against Geldermann prior to its

settlement with Geldermann. Therefore, the FDIC argues, the damages resulting from breaches of fiduciary duty by UMIC and Denney could not involve the same damages on which the settlement with Geldermann was reached because there was no breach of fiduciary duty claim against Geldermann at the time the settlement was completed.

The court agrees that the damages awarded for the breaches of fiduciary duty by Denney and UMIC cannot involve the same damages as the amount represented by the Geldermann settlement. At the time of that settlement, there was no breach of fiduciary duty claim. In any event, the FDIC's breach of fiduciary duty claims were based on each defendant's separate duty and action or inaction.

The FDIC next argues that defendants are not entitled to any credit for the settlement with Geldermann that would represent damages based on the Commodity Exchange Act claims. It contends that the damages awarded against Denney on these claims are based on a mathematical formula whereby the jury calculated damages according to the commissions received by Denney. The FDIC argues that the jury sought to require a form of restitution. According to the FDIC's argument, the commissions received by Denney and those received by Geldermann differed and, therefore, do not represent common damages.

Although there is evidence in the record on which the FDIC can base its argument that the damages awarded by the jury against Denney were based on a formula related to commissions, that is speculative

because there could also be other bases for the damages awarded by the jury. There is nothing in the jury verdict to indicate that the award was based on commissions earned by Denney, as the jury was asked only to determine the amount of compensatory damages attributable to violations of the Act. Although the settlement with Geldermann compromised the FDIC's claim that Geldermann had violated the Act, the conduct of Geldermann which allegedly violated the Act was not the same as that which formed the basis for allegations against other defendants. Accordingly, the record does not support a conclusion that these are common damages for which UMIC and Denney are entitled to a credit.

In accordance with the foregoing, the court concludes that the plaintiff is entitled to a total award of actual damages rendered by the jury in the amount of $576,000.00 against defendant Denney and $624,000.00 against UMIC, or a total of $1,200,000.00. The court further finds that prejudgment interest in [sic] not available in this case; however, the FDIC is entitled to post-judgment interest from the date of entry of the judgment. Finally, the defendants are not entitled to a credit for settlements entered between the FDIC and the defendants in the *Sevier* litigation or in connection with the settlement between the FDIC and Geldermann in this action.

The parties are directed to jointly prepare a judgment reflecting these findings and submit same to the court for approval no later than June 15, 1995.

IT IS SO ORDERED this 31st day of May, 1995.

/s/ Ralph Thompson
UNITED STATES
DISTRICT JUDGE

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

FEDERAL DEPOSIT INSURANCE CORPORATION Plaintiff – Appellee/ Cross – Appellant, v. UMIC INC,, a Tennessee Corporation; CHARLES ALEX DENNEY Defendants – Appellants/ Cross – Appellees, and ARTHUR A. WALLACE; BRYAN F. GREEN, Defendants.	)	Nos. 96-6089 and 96-6123

ORDER

Filed April 28, 1998

Before **PORFILIO, ANDERSON,** and **TACHA,** Circuit Judges.

Appellant's petition for rehearing is denied.

The suggestion for rehearing en banc was transmitted to all of the judges of the court who are in regular active service as required by Fed. R. App. P. 35. As no member of the panel and no judge in regular active

service on the court requested that the court be polled, the suggestion is also denied.

Entered for the Court
PATRICK FISHER, Clerk of Court

by: /s/ P. Illegible
Deputy Clerk

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF OKLAHOMA

FEDERAL DEPOSIT INSURANCE CORPORATION, as Manager of the FSLIC Resolution Fund, Plaintiff, v. UMIC, INC.; ALEX CHARLES DENNEY; ARTHUR A. WALLACE; and BRYAN F. GREEN, Defendants.	CIVIL ACTION NO. CIV-89-609-T

(Filed Aug. 24, 1994)

AMENDED SECOND REVISED FINAL PRETRIAL ORDER[1]

Date of Conference: ____, 1994

Appearances:

(a) Plaintiff.

(1) Federal Deposit Insurance Corporation, as manager of the FSLIC Resolution Fund: Kenneth I. Jones, JONES & BLANEY, 204 N. Robinson, 1600 CityPlace, Oklahoma City, Oklahoma 73101; and Douglas G.

[1] This Second Revised Final Pretrial Order is being submitted to comply with the Court's directive to amend the February 9, 1994 Revised Pretrial Order to reflect changes in witnesses, exhibits, parties, and claims since February 9.

Thompson, Jr., Frank A. Putzu, FINKELSTEIN, THOMPSON & LOUGHRAN, 2828 Pennsylvania Avenue, N.W., Suite 200, Washington, D.C. 20007;

(b) Defendants.

(1) Arthur A. Wallace: A. David Necco, Esq., NECCO & BYRD, 5700 North Portland, Suite 121, Oklahoma City, Oklahoma 73112-1662;

* * *

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF OKLAHOMA

FEDERAL DEPOSIT INSURANCE CORPORATION, as Manager of the FSLIC Resolution Fund, Plaintiff, v. GELDERMANN, INC.; UMIC, INC.; ALEX CHARLES DENNEY; ARTHUR A. WALLACE; and BRYAN F. GREEN, Defendants.	CIVIL ACTION NO. CIV-89-609-T

PLAINTIFF FDIC'S REVISED FINAL CONTENTIONS

Plaintiff FEDERAL DEPOSIT INSURANCE CORPORATION ("FDIC"), by and through undersigned counsel, hereby submits its final contentions[1]:

JURISDICTION AND VENUE

1. This Court has original jurisdiction over this action pursuant to 12 U.S.C. § 1730(k)(1), 7 U.S.C. § 25, 28

[1] Plaintiff FDIC's Final Contentions have been revised in accordance with its election to pursue claims against defendant Geldermann only on grounds of *respondeat superior* and principal/agent liability, the dismissal of defendant Gregg Crosby without prejudice, the breach of contract claim against UMIC and Geldermann and negligence claims against UMIC, Denney, Wallace, Green and Geldermann.

U.S.C. §§ 1331 and 1345, and under the doctrine of pendent jurisdiction.

2. The claims asserted arose in this judicial district. Defendants, at all relevant times herein, were doing business in this district, or reside in this district, so that venue is

* * *

ongoing assistance to Universal employees in establishing and maintaining accounting procedures for recording and accounting for futures and options trading implemented by GELDERMANN and UMIC on Universal's behalf. The futures and options trading undertaken for Universal was in part generated and supervised by UMIC employees who were former employees of GELDERMANN.

42. By reason of the foregoing facts, DENNEY and UMIC assumed the position of fiduciaries with respect to Universal and undertook a special duty of care toward Universal not to manipulate Universal's accounts for their own advantage, to refrain from recommending, promoting, or effecting transactions which were illegal, grossly reckless, excessively risky, or imprudent for Universal and contrary to the authorizations and desires of the board of directors, and to warn Universal's officers and directors of the illegal and grossly reckless speculation which DENNEY and UMIC were effecting.

RESULTS OF TRADING

43. Despite their position of superior knowledge, training, and experience in the commodity markets and

their awareness of the lack of competence and experience of the defendant officers, DENNEY and UMIC took advantage of the position of trust that they enjoyed to commit Universal's assets and savings deposits to speculative, unauthorized, and grossly reckless transactions.

44. DENNEY, as agent for UMIC and GELDERMANN, recommended, on a daily basis at least from April 1984 through May 1986, speculative purchase and sale transactions in commodity futures and options that were contrary to Universal's hedging investment objective.

45. DENNEY, as agent for UMIC and GELDERMANN, gave advice and opinions concerning interest rate changes as the basis for speculative commodity transactions which they executed and from which they derived huge commissions.

46. DENNEY, as agent for UMIC and GELDERMANN, knew of, recommended, and executed commodity futures and options transactions for Universal that were excessive in frequency and volume and wholly inconsistent with Universal's investment objective of hedging Universal's securities portfolio.

47. In the period from March 1984 through April 1986, Universal's commodity futures and options trading transactions were effected through UMIC and GELDERMANN. All such transactions were executed on or subject to the rules of contract markets designated by the CFTC. During the period March 1984 through December 31, 1984, UMIC and GELDERMANN charged and collected from Universal commissions on futures and options transactions in excess of $2,020,089.

48. During the period January 1, 1985, through December 31, 1985, UMIC and GELDERMANN charged and collected from Universal commissions on futures and options transactions in excess of $2,003,647.

49. During the period March 1984 through April 1986, when the account was closed, Universal suffered a net loss of at least $6,269,504 on commodity futures and options trading at UMIC and GELDERMANN. Of this amount, at least $3,341,332 is attributable to commissions paid to GELDERMANN and shared by DENNEY and UMIC.

ACTS OF MISREPRESENTATION, OMISSION, FRAUD, AND BREACH OF FIDUCIARY DUTY

50. DENNEY solicited Universal to open and to maintain commodity futures and

* * *

overwhelmingly speculative in nature and not proper hedging activity.

EXISTENCE OF AGENCY RELATIONSHIPS

72. DENNEY, an associated person of UMIC, was an agent acting for UMIC within the scope of his duties and within the meaning of Section 2(a)(1)(A) of the CEA, 7 U.S.C. § 4, and common law principles of agency, in accordance with the Court's Memorandum Opinion and Order, dated September 30, 1993.

73. GELDERMANN entered into an agreement with UMIC to solicit Universal's futures and options business

as an "introducing firm" for GELDERMANN, cleared Universal's speculative futures and options trades, gave daily trading advice and other advice to UMIC, DENNEY, and Universal's defendant officers and to other customers of UMIC, shared with UMIC, and in-turn DENNEY, on a per-trade basis commissions paid by UMIC customers including Universal, provided UMIC with standardized risk of loss disclosure documents required by the Commodity Futures Trading Commission, performed a variety of accounting and other services for UMIC, including making and collecting margin, segregating customer funds, preparing and making trading confirmations and monthly statements, and reporting customer positions to self regulatory organizations, used UMIC to distribute GELDERMANN's risk disclosure statements and account opening documents, and formally agreed to assist UMIC in marketing and advertising. UMIC and GELDERMANN became partners in marketing their services to the savings and loan industry in general and to Universal in particular. By means of the foregoing, UMIC and DENNEY were and acted as GELDERMANN's agents within the meaning of Section 2(a)(1)(A) of the CEA, 7 U.S.C. § 4, and common law principles.

* * *

and abetting constitutes a violation of Section 13(a) of the CEA, 7 U.S.C. § 13c(a) (1982).

Vicarious Liability of UMIC

99. Between January 1, 1984, and April 30, 1986, DENNEY was in the employ of UMIC and was an agent of UMIC and the conduct committed by DENNEY in

violation of the CEA was all committed within the scope of his employment and agency.

100. By reason of the foregoing, UMIC is liable for DENNEY's violation of the CEA as though UMIC were a principal. Section 2(a)(1)(A) of the CEA, 7 U.S.C. § 4.

Vicarious Liability of GELDERMANN

101. During all relevant times, UMIC maintained an exclusive relationship with GELDERMANN whereby all transactions in futures contracts or options contracts for the accounts of Universal and other institutions solicited by UMIC and its employees were effected through GELDERMANN.

102. UMIC served as a conduit for the distribution of GELDERMANN's customer account opening forms and risk disclosure documents to institutional accounts, including Universal, to whom UMIC proposed to and did recommend futures and options transactions. These GELDERMANN forms and documents were then routinely returned directly to GELDERMANN by institutions solicited by UMIC who thereby became "customers" of GELDERMANN. New account forms and risk disclosure documents for Universal, if given at all, also were handled in this fashion.

103. Between March 1984 and April 1986, UMIC and GELDERMANN, and in turn DENNEY, shared and split the commissions generated on a per-trade basis by futures and options trading in the account of Universal.

104. Between at least March 1984 and April 1986, GELDERMANN provided materials for training of UMIC

salespersons about futures and options, and UMIC used such materials for such purposes.

105. GELDERMANN, during 1983 and 1984, provided training and assisted UMIC in providing various seminars which institutions that had been introduced to futures and options markets by UMIC attended.

106. GELDERMANN provided technical literature to UMIC which recommended specific trading positions. Such literature was made available directly to DENNEY, WALLACE and GREEN and used as a basis for some of the options and futures trading which is the subject of this action.

107. GELDERMANN formed a marketing partnership with UMIC and agreed to and provided UMIC with marketing support services including literature and seminars.

108. By reason of the foregoing, at all relevant times, UMIC and DENNEY were agents of GELDERMANN, and the conduct committed by UMIC and its employee and agent DENNEY in violation of the CEA was all committed within the scope of this agency.

109. By reason of the foregoing, GELDERMANN is liable for UMIC's and DENNEY's violations of the CEA as though GELDERMANN were a principal. Section 2(a)(1)(A) of the CEA, 7 U.S.C. § 4 (1982).

Breach of Fiduciary Duty by UMIC and DENNEY

110. By virtue of the nature of the FCM/customer relationship between Universal and UMIC and DENNEY, these defendants were charged with certain fiduciary

duties imposed by common law, the CEA, and various federal regulations.

* * *

DAMAGES TO UNIVERSAL

135. The unauthorized, speculative futures and options trading in Universal's designated hedge account at GELDERMANN during the period March 1984 through April 1986 caused losses in excess of $6 million, the exact amount to be quantified by expert testimony at trial. Plaintiff is entitled to at least this amount in actual damages from all defendants, jointly and severally, plus interest and reasonable attorney's fees and costs, as allowed by law, and such other relief as may be just and proper.

PUNITIVE DAMAGES

136. As to all defendants, Plaintiff is entitled to punitive and exemplary damages, jointly and severally, in an amount sufficient to punish defendants and deter future violations by others, but in no event less than $15 million against defendants GELDERMANN, UMIC, and DENNEY.

OTHER RELIEF

137. Plaintiff is entitled to an order requiring GELDERMANN, UMIC and DENNEY to account for all commissions and other fees and profits derived from handling and trading the account of Universal from March 1984 through April 1986 and for all benefits realized therefrom.

138. Plaintiff is entitled to an order impressing a constructive trust in favor of Plaintiff upon so much of the assets of GELDERMANN, UMIC and DENNEY as was derived from their fraudulent and wrongful handling of Universal's account.

139. UMIC and DENNEY fraudulently and wrongfully obtained and received the benefits of assets and property of Universal in the form of illegal and excessive commissions

* * *

SETTLEMENT AGREEMENT

THIS SETTLEMENT AGREEMENT, ESCROW AGREEMENT AND RELEASE ("SETTLEMENT AGREEMENT") is made and entered into this 6th day of September, 1989, by and among FEDERAL DEPOSIT INSURANCE CORPORATION AS MANAGER OF THE FSLIC RESOLUTION FUND ("FDIC"); LARRY SEVIER; RICHARD L. ALLEN; ROBERT G. HUNTER; DAN RAMSEY; PERRY RAMSEY; EDWARD LEE BLEVINS; BURTON C. McDOUGAL; LONNIE W. JOURDAN (collectively, the "Directors"); MICHAEL L. HARRIS ("Harris"); and VIRGINIA SURETY COMPANY, INC. ("Virginia Surety").

RECITALS

A. Universal (as hereinafter defined) was place into receivership by the Federal Home Loan Bank Board on February 13, 1987.

B. FDIC, as assignee of certain claims of Universal, has asserted claims against the Directors and Harris which are pending, respectively, in the Sevier Action and the FIS Action (each as hereinafter defined). The claims asserted in those Actions arose out of certain alleged acts or omissions by the Directors and Harris that allegedly resulted in injury and damage to Universal. In connection with those Actions, Harris filed (and other parties sought leave to file) a third-party complaint against the Directors for contribution and/or indemnity.

C. Virginia Surety issued the Policy (as hereinafter defined) for a period beginning April 22, 1983. The Policy

was issued to Grady County Savings and Loan Association, a mutual association which was converted to Universal, a federal savings and loan stock association, after the inception date of the Policy. The Policy was amended by endorsement to reflect the change in the insured's name and charter.

D. The parties desire to enter into this Settlement Agreement in order to (a) provide for certain payments, assignments, and releases, in full settlement and discharge of all claims, rights, or responsibilities between and/or among them or any combination relating to or in connection with the operation of Universal, save and except those claims specifically identified for exclusion herein; and (b) obtain judicial orders barring all claims for contribution and indemnity that have been or might be asserted against the Settling Parties by persons or entities who are liable in tort to FDIC as joint tortfeasors with the Settling Parties in connection with the operation of Universal.

NOW, THEREFORE, in consideration of mutual covenants set forth this Settlement Agreement, the receipt and sufficiency of which are hereby acknowledged, FDIC, the Directors, Harris, and Virginia Surety agree as follows:

1. Definitions.

This Settlement Agreement, including the Recitals set forth above, is to be read and interpreted in accordance with the definitions that follow. Terms defined in any other part of this Settlement Agreement shall have the defined meanings wherever capitalized herein.

A. "Aetna": Aetna Casualty & Surety Company.

B. "Assignment": The assignment of claims referred to in Section 6 of this Settlement Agreement.

C. "Bond": Fidelity Bond No. 40F2130BCA issued by Aetna.

D. "Declaratory Judgment Action": An action for declaratory relief under 28 U.S.C. § 2201, commenced by FDIC in accordance with Section 7(e) of this Settlement Agreement.

E. "District Court": The United States District Court for the Western District of Oklahoma.

* * *

attorneys' fees, incurred by the Escrow Agent in connection with or arising out of its action with respect to the Settlement Fund.

i) The Escrow Agent's acceptance and administration of the Settlement Fund shall constitute the submission of the Escrow Agent to the jurisdiction of the District Court for the purpose of carrying out this Settlement Agreement.

j) The rights and responsibilities under this Settlement Agreement may not be assigned by the Escrow Agent without prior written approval of the parties hereto; provided, however, that if no approval can be obtained after good faith effort, then upon thirty (30) days' written notice by the Escrow Agent to the parties hereto, the Escrow Agent shall have the right to apply to the District Court for instructions.

5. Releases and Document Escrow Provisions.

(a) FDIC shall execute a release in the form attached hereto as Exhibit 5 and deposit such release with its counsel, Tuttle & Taylor, within five (5) business days of the Settlement Date. After the Settlement Effective Date, upon delivery to the Settling Parties in accordance with subsection (d) below, such release will become effective and will fully, finally, and forever release and discharge the Settling Parties with respect to any and all demands, claims or causes of action which FDIC may now have or hereafter acquire, including without limitation claims formerly held by any entities with whom FDIC is or may have been in privity, of every nature and kind whatsoever, known or unknown (including without limitation shareholders' derivative claims to the extent that FDIC may have standing to release such claims, without FDIC warranting that it has such standing), in connection with or relating to such parties' association with and operation of Universal, regardless of whether the demands, claims or causes of action arise in tort, in contract, by violation of fiduciary duty, or by violation of statute or regulation (including without limitation those violations pertaining to securities transactions). Provided, however, that the foregoing release will specifically exclude all FDIC's claims against Harris for fraud, dishonesty, or other conduct covered by the Bond (including the claims asserted in Count X and Count XI of the First Amended Complaint in the FIS Action). Notwithstanding the foregoing, FDIC does hereby reserve, save, maintain and preserve all claims, demands, or causes of action, in connection with, or relating to such parties' association with and operation of Universal, against all other former officers, directors,

securities brokers-dealers, commodities broker-dealers, attorneys, accountants, agents, representatives, or other persons not specifically released under this Settlement Agreement.

(b) FDIC shall cause the Receiver to execute a release in the form attached hereto as Exhibit 6 and deposit such release with Tuttle & Taylor within five (5) business days of the Settlement Date. After the Settlement Effective Date, upon delivery to the Settling Parties in accordance with subsection (d) below, such release will become effective and will fully, finally, and forever release and discharge the Settling Parties with respect to any and all demands, claims, or causes of action which the Receiver may now have or hereafter acquire (without the Receiver warranting that it has any such demands, claims, or causes of action), including without limitation claims formerly held by any entities with whom the Receiver is or may have been in privity, of every nature and kind whatsoever, known or unknown (including without limitation shareholders' derivative claims to the extent that the Receiver may have standing to release such claims, without the Receiver warranting that it has such standing), in connection with or relating to such parties' association with and operation of Universal, regardless of whether the demands, claims or causes of action arise in tort, in contract, by violation of fiduciary duty, or by violation of statute or regulation (including without limitation those violations pertaining to securities transactions). Provided, however, that the foregoing release will specifically exclude

* * *

16. Supplementary Action.

All parties agree to cooperate fully and execute any and all supplementary documents and to take all additional action which may be necessary or appropriate to give full force and effect to the terms and provisions of this Settlement Agreement.

17. Counterparts.

This Settlement Agreement and any of the documents required or contemplated to be executed in order to consummate this Settlement Agreement may be executed in one or more counterparts, each of which shall be deemed an original and all of which shall be deemed to be one and the same instrument.

18. Binding Effect.

This Settlement Agreement shall not be binding until executed and delivered by each of the parties hereto. Thereafter, this Settlement Agreement shall be binding upon the parties hereto and their respective estates, heirs, executors, legal representatives, personal representatives agents, successors, and assigns, and shall inure to the benefit of such persons.

FEDERAL DEPOSIT INSURANCE CORPORATION AS MANAGER OF THE FSLIC RESOLUTION FUND

By /s/ David G. Eisenstein
David G. Eisenstein
Assistant General Counsel
Federal Home Loan Bank Board

Dated: Sept. 6, 1989

VIRGINIA SURETY COMPANY, INC.

Dated: 9-6, 1989 By /s/ Illegible

Dated: 8-30, 1989 By /s/ Michael Harris

MICHAEL HARRIS

Dated: 8-29, 1989 By /s/ Larry Sevier

LARRY SEVIER

Dated: 8-29, 1989 By /s/ Richard L. Allen

RICHARD L. ALLEN

Dated: 8-29, 1989 By /s/ Robert G. Hunter

ROBERT G. HUNTER

Dated: 8-29, 1989 By /s/ Dan D. Ramsey

DAN D. RAMSEY

Dated: 8-29, 1989 By /s/ Perry Ramsey

PERRY RAMSEY

Dated: 8-29, 1989 By /s/ Edward Lee Blevins
EDWARD LEE BLEVINS

Dated: 8-29, 1989 By /s/ Burton C. McDougal
BURTON C. MCDOUGAL

Dated: 8-29, 1989 By /s/ Lonnie W. Jourdan
LONNIE W. JOURDAN

SETTLEMENT AGREEMENT AND GENERAL RELEASE

This Settlement Agreement and General Release (the "Agreement") is entered into by and between Geldermann, Inc. and the Federal Deposit Insurance Corporation as Manager of the FSLIC Resolution Fund (the "FDIC").

As used herein, the term "the Company" shall refer collectively to Geldermann, Inc.; to each of its predecessor and successor corporations and entities; and to its present and former parent, subsidiary and affiliate corporations and entities.

Recitals

WHEREAS, there is now pending in the United States District Court for the Western District of Oklahoma a case captioned *Federal Deposit Insurance Corporation v. Geldermann, Inc.; UMIC, Inc.; Charles Alex Denney; Arthur A. Wallace; and Bryan Green* (the "Lawsuit"); and

WHEREAS, the FDIC has asserted claims against the Company relating to the trading of futures and options in the accounts maintained by Universal Savings Association, F.A. of Chickasha ("Universal") with Geldermann; and

WHEREAS, the FDIC, as manager of the FSLIC Resolution Fund (the "Fund") in its corporate capacity under 12 U.S.C. § 1821a(a)(1), brought the claims as transferee of the claims acquired by the Federal Savings and Loan Insurance Corporation ("FSLIC") as Receiver for Universal pursuant to 12 U.S.C. § 1729(c)(1)(B) and 12 U.S.C. § 1464 (d)(6)(A).

WHEREAS, the Company has at all times denied any wrongdoing or other actionable conduct whatsoever in connection with Universal's accounts, denied any liability to the FDIC, and maintained that the FDIC's purported claims were subject to affirmative defenses; and

WHEREAS, the Company, solely to avoid the expense, inconvenience and distraction of further legal proceedings, controversy, and legal fees and costs, and without any admission of any liability or wrongdoing of any kind, is willing and has agreed to compromise and settle the Lawsuit in full upon the terms and conditions set forth in this Agreement.

NOW, THEREFORE, for and in consideration of the promises, releases and representations herein set forth, and for other good and valuable consideration, receipt of which is hereby acknowledged, the parties agree as follows:

1. *Incorporation*: The preamble and Recitals set forth above are hereby incorporated and made a part of this Agreement.

2. *Representations, Warranties and Covenants of the FDIC and the Company*: Knowing and intending that Geldermann shall rely thereon, the FDIC represents and warrants to Geldermann that:

A. Elizabeth Streit, Senior Attorney, Professional Liability Section, Federal Deposit Insurance Corporation, is, as of the date of this Agreement, duly authorized to enter into this Agreement and bind the FDIC to its terms.

B. Ned W. Bennett, Vice President, Geldermann, Inc., is, as of the date of this Agreement, duly authorized to enter into this Agreement and bind the Company to its terms.

C. The Agreement is a legal, valid and binding obligation of the FDIC and the Company, enforceable in accordance with its terms except as enforceability may be effected by general principles of equity (regardless of whether enforcement is sought in a proceeding in equity or at law).

D. The foregoing representations and warranties shall survive the closing.

3. *Payment to the FDIC*: Within thirty days of the date of this Agreement, the Company will deliver to the FDIC a certified or cashier's check drawn upon a depository institution acceptable to the FDIC in the amount of Six Hundred Thousand and 00/100 dollars ($600,000.00). The Company agrees to make this payment in full and final settlement of all claims and as total consideration for

the release of all claims by the FDIC. The Company agrees to make this payment for the sole purpose of settling all claims and avoiding litigation, and does so without acknowledging any liability resulting from the claims raised by the FDIC. If for any reason the Company is unable to make the payment within thirty days, interest shall be paid at the one-year Treasury Bill rate as reported in the Wall Street Journal at the end of the last quarter immediately preceding the date of this Agreement from the date thirty days after the date of this agreement through the date of payment.

4. *Mutual Release of Claims:* The FDIC, on behalf of itself, its agents, legal representatives, successors, privies and assigns, does hereby remise, release, acquit, satisfy and forever discharge the Company; the Company's present and former shareholders, officers, directors, employees, controlling persons, and other agents and representatives, except for UMIC, Inc. and any of its employees, agents, representatives and successors; and any of the foregoing's spouses, legal representatives, heirs, descendants, administrators, executors, estates, successors, privies and assigns, of and from all and all manner of action and actions, cause and causes of action, suits, debts, dues, sums of money, accounts, bonds, bills, covenants, contracts, controversies, agreements, promises, trespasses, damages, judgments, executions, claims, grievances, disputes and demands whatsoever, in law or in equity, which the FDIC ever had, now has, or which the FDIC or any personal representative, successor, or assign of the FDIC hereafter can, shall or may have against the Company and/or any of the foregoing persons or entities for, upon or by reason of any matter,

cause or thing arising from or in connection with Universal's accounts with Geldermann, from the beginning of the world to the date of this Agreement.

The Company, on behalf of itself, its agents, legal representatives, successors, privies and assigns, does hereby remise, release, acquit, satisfy and forever discharge the FDIC; the FDIC's present and former shareholders, officers, directors, employees, controlling persons, and other agents and representatives, and any of its employees, agents, representatives and successors; and any of the foregoing's spouses, legal representatives, heirs, descendants, administrators, executors, estates, successors, privies and assigns, of and from all and all manner of action and actions, cause and causes of action, suits, debts, dues, sums of money, accounts, bonds, bills, covenants, contracts, controversies, agreements, promises, trespasses, damages, judgments, executions, claims, grievances, disputes and demands whatsoever, in law or in equity, which the Company ever had, now has, or which the Company or any personal representative, successor, or assign of the Company hereafter can, shall or may have against the FDIC and/or any of the foregoing persons or entities for, upon or by reason of any matter, cause or thing arising from or in connection with Universal's accounts with Geldermann, from the beginning of the world to the date of this Agreement.

Nothing in this Agreement shall constitute a release of any claims, causes of action or any other action or proceeding of the FDIC against Geldermann which arise out of accounts of any savings and loan association, bank or financial institution other than Universal. The FDIC does not release, and reserves all claims and causes of

action against, UMIC, Inc., Charles Alex Denney, Bryan Green or Arthur A. Wallace or any other alleged joint tortfeasor.

5. *Non-Assignment of Claims:*

a. The FDIC represents and warrants that it has not assigned or otherwise transferred to any person or entity, and will not assign or otherwise transfer to any person or entity, any claim, right or interest of any nature, description or amount

* * *

Federal Deposit
Insurance Corporation

By: /s/ Elizabeth Streit
Elizabeth Streit,
Senior Attorney,
Professional Liability Section

Geldermann, Inc.

By: /s/ Ned W. Bennett,
Ned W. Bennett,
Vice President

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

FEDERAL DEPOSIT INSURANCE CORPORATION AS MANAGER OF THE FSLIC RESOLUTION FUND,	)	Case No. CIV-89-609-T
Plaintiff,	)	
v.	)	
GELDERMANN, INC., *et al.*,	)	
Defendants.	)	

REPLY BRIEF OF PLAINTIFF FEDERAL DEPOSIT INSURANCE CORPORATION AS MANAGER OF THE FSLIC RESOLUTION FUND IN SUPPORT OF MOTION FOR ORDER CONFIRMING GOOD FAITH SETTLEMENT

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Counsel for Plaintiff

* * *

the $725,000 paid in settlement.[11] And they will not have to incur the legal expense of proving that the Settling Directors bear some responsibility for the losses for which the defendants were held liable to the FDIC or of attempting to enforce a judgment against virtually judgment proof individuals.

Under a proportional rule, a vastly different scenario will result, assuming that the Settlement Agreement becomes final.[12] The FDIC's judgment against the defendants will be reduced by the proportionate liability of the Settling Directors as determined in the trial of this action, without regard to how much of the setoff could actually

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[11] The FDIC is of the view that the $525,000 payment by Virginia Surety should not be applied as a setoff against the damages ultimately assessed in this case because the Virginia Surety policy would not have covered the Settling Directors in this case, as the defendants concede. Geldermann, Opp. at 3. The FDIC is willing to stipulate, however, to an offset in this case of $200,000, the value placed on the Settling Directors' claims in unrelated litigation when they were assigned to the FDIC under Section 6 of the Settlement Agreement. In view of this stipulation, there was in fact a payment by the Settling Directors for the release of the FDIC's potential claims against them in this action. Thus, the Directors did not receive a "free pass" out of this litigation, notwithstanding FSLIC's negotiating posture as expressed in its staff lawyer Mr. Mittelman's correspondence with outside counsel. *See* Geldermann Opp. at 10-11; Carey Aff., Exh. 12, at 1 (Letter from Frederic Mittelman to W. Kirby Lockhart).

[12] The FDIC has the right to terminate the Settlement Agreement if judicial orders are not obtained in this or other actions that cap the setoff to be applied at $725,000. Settlement Agreement § 3(b).

have been collected from their personal assets if the defendants had instead received a judgment for contribution against them. Thus, while the payment actually received by the FDIC was in large part determined by the practical limitations of the insurance coverage and personal wealth of the Settling Directors, the credit to be received by the defendants will have no such limitation. Only through the very biased eyes of the defendants can such a result be considered "equitable."[13]

* * *

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[13] The very article quoted at length by the defendants to support their assertion that the pro tanto rule is inequitable includes a lengthy summary of the disadvantages of the proportional rule:

> In a conceptual sense, the rule is inconsistent with both the goals of joint and several liability and its inherent limitation that a claimant be limited to one full

* * *

IN THE
UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

Nos. 91-6044 and 91-6035

FEDERAL DEPOSIT INSURANCE CORPORATION,
as Manager of the FSLIC Resolution Fund,
Plaintiff-Appellee,

v.

GELDERMANN, INC., an Illinois corporation;
UMI, INC., a Tennessee corporation;
CHARLES ALEX DENNY; ARTHUR A. WALLACE; and
GREGG CROSBY
Defendant-Appellants,

Appeal from the United States District Court
for the Western District of Oklahoma
Civil Action No. CIV-89-609-T

BRIEF OF APPELLEE FEDERAL DEPOSIT INSURANCE CORPORATION

Of Counsel:

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Attorneys for Appellee
FEDERAL DEPOSIT INSURANCE CORPORATION

* * *

Directors should be allocated to the release of potential claims against the Directors in connection with the damages sought in this case.

The District court found that a pro tanto contribution bar rule governs settlements entered into by the FDIC, and that the FDIC's settlement with the Directors was entered into in good faith. In addition to finding that there was no collusion between the settling parties, the District Court ruled in effect that a setoff of anywhere between $200,000 and $725,000 was adequate, in light of the Directors' limited financial resources and insurance coverage, to compensate the Nonsettlors for the loss of any right they might have to bring contribution and indemnity claims against the Directors. Although the Nonsettlors assert that their potential liability is to be reduced by only a "token" amount, Nonsettlors Br. at 30,

they have not challenged the District Court's good faith determination in this appeal. Thus, at this time, they have no basis to challenge the amount of the setoff.[9] Their appeal must succeed or fail based solely on whether the District court correctly applied a pro tanto, instead of a proportional, contribution bar rule.

IV. A FEDERAL COMMON LAW PRO TANTO CONTRIBUTION BAR RULE SHOULD BE APPLIED TO THE RELEASE OF CLAIMS BY THE FDIC

A. Federal Law Governs The Release Of Claims By the FDIC

The threshold question is whether federal or statute law applies. This Court has recognized that "[w]hen the United States litigates or seeks a remedy arising from

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[9] If and when a final judgment is entered against them, taking into account a specific setoff based on this settlement, the Nonsettlors then will have the opportunity to challenge the setoff amount, the fact that only a specific setoff amount remains to be determined, rather than a setoff method (pro tanto vs. proportional), distinguishes this case from the Fourth Circuit's decision in *Jiffy Lube*. In this case, the District Court did exactly what the Fourth Circuit ruled the trial court was required to do – decide what contribution bar rule would govern the determination of the setoff amount.

EDWARD D. HOROWITZ – DIRECT (By Mr. Thompson)

[p. 1332] Q: And in this case, was UMIC and introducing firm for Geldermann?

A: Yes.

Q: And are the policies and procedures of other firms in the commodities business something that experts in your field would customarily and typically rely upon in forming your opinions?

A: Yes.

Q: In connection with the – with your review of the Geldermann policies, are these some – what's shown on this visual aid – some excerpts from the Geldermann policies that you reviewed in connection with this matter?

A: Yes, they are.

Q: All right. Is the requirement to – Is there a requirement, excuse me, in the Geldermann policies, with respect to the obligations of the account executive and the account on this question of whether the account is a hedger or a speculator?

A: Yes.

Q: And what is reflected by the Geldermann policies on that question?

A: It's covered in the first quote on the board here:

"The account executive must determine whether a prospective customer is a hedger or a speculator. The distinction is extremely important, because the firm will permit bona fide hedgers to margin their accounts using

hedge margin [p. 1333] requirements on hedge transactions."

If you look at the third box, it talks about speculative accounts and hedge accounts are very different in their intent and many other things, and in the final line: "Hence, no hedge letters should be submitted unless they are legitimate." And the hedge letter is the one that's a part of Exhibit Number 1, where it says the intent of the account is to be used for hedging purposes.

MR. THOMPSON: Your Honor, this is a visual aid from another exhibit, Plaintiff's Exhibit Number 5. that also has nod [sic] been admitted in evidence in the case.

Q: (BY MR. THOMPSON) Mr. Horowitz, is this an excerpt from another Geldermann policy that you reviewed in connection with forming your opinions in this case?

A: Yes, it is.

Q: And is the Geldermann policy – this is excerpted also – something that experts in your field would typically and customarily rely upon?

A: It is.

Q: And with respect to this particular excerpt, Mr. Horowitz, does this – what does this have to say with respect to the issue that we've been discussing, the difference between hedge accounts and speculative accounts?

A. Well, in the first box under the Number 1 it says:

"A risk with these accounts is that they could turn from [p. 1334] hedging to speculating. It is the rep's

responsibility to constantly monitor their trading to avoid this situation."

And this is referring to Number 1, which is, "Commercial Hedging."

So that is a risk that must be monitored by the broker on a regular basis.

Q: And is there any specific reference in Geldermann's policy to savings and loan customers?

A: Yes, and that's covered on the bottom, the large paragraph on the bottom which talks about the savings and loans being a risk.

"There's a fiduciary relationship, which could lead to unpleasant results in a lawsuit brought against Geldermann –

MR. McLEAN: Your Honor, I would object to any legal conclusions here. The witness is talking about fiduciary results and obligations, and I believe that invades the province of the Court.

THE COURT: Overruled.

You're reading from the excerpt; aren't you, sir?

THE WITNESS: That's what I'm trying to do, Your Honor.

THE COURT: Please proceed.

THE WITNESS: All right.

A: I was up to the parentheses there, so I'll go back slightly.

* * *

BRYAN EDWIN GREEN – DIRECT (By Mr. McLean)

[p. 1689] this activity.

And, I mean, this is the first time I really started using my – my high school algebra. We started from a negative. We didn't start from zero. Mr. Harris left us probably $7 million in the hole. We were up about $2 million when all this ended.

So I don't look at this that I made $2 million for that institution. I look at this that we started $7 million down, and, when all this was over, we were approximately $2 million up. So we made roughly about $9 million, everything in total for that institution. All the pieces. you've got to take all – I mean, that's one reason it's so important to have that cash information, because it tells that side of the story. And as I pointed out, some way – We can't get that information. I mean, it's just ironic that that information has mysteriously just disappeared from the records of the institution.

MR. McLEAN: Mr. Green, if you could give me just a minute.

Your Honor, If I could have a minute.

THE COURT: Yes.

MR. McLEAN: Thank you, Mr. Green. I have no more questions of you at this time.

MR. NECCO: Your Honor, I have no questions.

MR. SNEED: Your Honor, I had originally intended to ask the Court to let me reserve my opportunity to question Mr. Green, but after hearing the direct, I believe it would be

* * *

MARSHA ANN COFFEY – DIRECT (By Mr. McLean)

[p. 2082] Journal and get a market price of a mortgage-backed security on a historical basis because of the way they traded. What you get in the Wall Street Journal is a generic price. They didn't trade that way back in 1984. So although I would have liked to have done that, I couldn't do it.

What I did do was I looked at the market value of the last $25 million of the trading portfolio that they acquired in March of 1984. So I was kind of thinking of it on a last-in/first-hedged basis. And I – they were all US Treasury twelve-percent 30-year bonds, and I looked at the change in market value for different periods.

Over the entire period, those bonds increased in value by $11-and-a-half million. So if they hadn't of done all of the assets changing that they did and had hung on to those bonds that they originally started out hedging, they would have actually increased the market value by $11-and-a-half million.

Now, the securities started out with a loss, so that doesn't mean that they could have sold them for an $11-and-a-half million profit; it just means that, from the starting point of the program, March 28th of '84 until April 7th of '86, had they continued to hold the bonds, those are the gains that they would have received. The

losses on hedging was – was $6.4 million, or if you want to take the whole program of $6.3 million. It's almost – it's a little more than half of the increase in the value.

Supreme Court, U.S.
FILED
SEP 23 1998
OFFICE OF THE CLERK

(2)

No. 98-186

In the Supreme Court of the United States

OCTOBER TERM, 1997

UMIC, INC., AND ALEX CHARLES DENNEY,
PETITIONERS

v.

FEDERAL DEPOSIT INSURANCE CORPORATION,
AS MANAGER OF THE FSLIC RESOLUTION FUND

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE FEDERAL DEPOSIT INSURANCE CORPORATION IN OPPOSITION

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12 pp

QUESTIONS PRESENTED

1. Whether the court of appeals correctly held that because prior settlements were for separate and distinct injuries, the jury's damage awards against petitioners for breach of fiduciary duty should not be reduced by the amounts of the settlements.

2. Whether federal law entitled petitioners to a credit for the settlement amounts against the jury's damage award on the Federal Deposit Insurance Corporation's claims under the Commodity Exchange Act, 7 U.S.C. 1 *et seq.*

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OPINIONS BELOW

The opinion of the court of appeals is reported at 136 F.3d 1375. Pet. App. 1-30. The district court's order denying petitioners' motion to reduce the judgment against them is unreported. Pet. App. 31-44.

JURISDICTION

The judgment of the court of appeals was entered on February 18, 1998. A petition for rehearing was denied on April 28, 1998. Pet. App. 45-46. The petition for a

writ of certiorari was filed on July 27, 1998. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Universal Savings Association, F.A. (Universal), a federally-insured thrift located in Oklahoma, invested heavily in Treasury bonds. Rising interest rates led the value of the bonds to decline. Petitioner Alex Charles Denney (Denney) was a sales representative for UMIC, a full service brokerage firm. In 1984, Denney made a presentation to Universal's Board of Directors, explaining that the thrift could use financial options and futures to hedge against the risk of rising interest rates. Pet. App. 3. After the presentation, Universal opened a commodities account with Geldermann, the firm executing the trades, and with UMIC, the introducing broker. *Id.* at 4. Although Denney and UMIC knew that Universal was subject to federal thrift regulations limiting speculative commodities trading—and despite UMIC's written policy restricting its account to low risk hedging—only one-fifth of the 73,000 trades in Universal's account were hedges. The rest of the trades increased, rather than decreased, Universal's exposure to interest rate fluctuation risk. When the account was finally closed in early 1986, the risky and highly speculative trading Denney recommended resulted in losses of $6.2 million, more than $3.4 million of which constituted commissions to Denney, UMIC, and Geldermann. *Id.* at 4-5. In early 1987, Universal closed and FSLIC was appointed its receiver. *Id.* at 3.

2. FSLIC sued UMIC, Denney, Geldermann and others to recover Universal's losses. Pet. App. 2. The FDIC, as Manager of the FSLIC Resolution Fund, succeeded FSLIC as plaintiff. *Id.* at 3. The FDIC alleged that Geldermann, UMIC and Denney violated the Com-

modity Exchange Act (CEA), 7 U.S.C. 1 *et seq.*, and that UMIC, Denney and other defendants breached their fiduciary duties to Universal and engaged in common law fraud. Pet. App. 2. The FDIC subsequently dismissed all of its state law claims against Geldermann, leaving only the CEA claim; before trial, the FDIC and Geldermann settled the CEA claim for $600,000. *Id.* at 5. At trial, the jury awarded the FDIC $288,000 against Denney and $624,000 against UMIC specifically for breaching their fiduciary duties under state law, and an additional $288,000 against Denney specifically for CEA violations. *Ibid.*

3. After trial, Denney and UMIC sought to reduce those awards by $600,000 (the amount of the Geldermann settlement) and by $725,000 (the amount the FDIC received for settling unrelated litigation against Universal's board of directors for mismanaging Universal in connection with other investments (the Sevier Settlement)), pursuant to the rule requiring pro tanto reductions for settlements. Pet. App. 5. The district court held that the damage awards against petitioners should not be reduced, finding the settlements and the judgment were based on separate injuries. *Id.* at 40-44.

4. The court of appeals affirmed the district court's denial of a credit against the jury awards for the prior settlements. Pet. App. 1-30. The court of appeals found that UMIC and Denney were not entitled to the credits because the prior settlements and the judgment "do not represent common damages for a single injury." *Id.* at 7-8. To support its conclusion, the court of appeals cited record evidence that the jury awarded damages against UMIC and Denney only for the specific injuries that each defendant had caused individually, and not for the total losses sustained by Universal. The court of appeals found no basis for concluding "that the prior

settlements with Geldermann and the Universal directors cover any portion of the damages assessed against Denney and UMIC." *Id.* at 8.

ARGUMENT

The Tenth Circuit correctly held that the "one satisfaction rule" did not entitle petitioners to a credit for the FDIC's prior settlements, because neither the Sevier settlement (involving different defendants and different claims) nor the Geldermann settlement represented damages common with those covered by the jury award. The Tenth Circuit applied settled law to the facts of this case. Its decision creates no conflict with the decisions of this Court or other courts of appeals that requires further review.

1. Petitioners contend that the decision below conflicts with this Court's holding in *O'Melveny & Myers* v. *FDIC*, 512 U.S. 79 (1994). They argue that, "by refusing to follow *O'Melveny & Myers* and apply controlling Oklahoma case law, the Tenth Circuit altered the outcome of the case[.]" Pet. 16. Petitioners are correct that state, not federal law, governs the right to set off prior settlement amounts against a judgment in a state law cause of action; no one contends otherwise. All parties before the court of appeals agreed that the FDIC's breach of fiduciary duty claims are generally governed by state law. See Brief of Defendants-Appellants UMIC, Inc. and Charles Alex Denney filed in Appeal Nos. 96-6089 and 96-6123 (First Brief) at 17 and Appellee/Cross-Appellant FDIC's Second Brief on Cross-Appeal at 23 n.7. The Tenth Circuit proceeded on that assumption. See Pet. App. 16-17, 27. In fact, petitioners concede that the Tenth Circuit correctly held that the case is governed by the "one satisfaction" pro tanto rule which Oklahoma follows. Pet. 8-9.

Nonetheless, petitioners argue that the court of appeals misapplied the Oklahoma rule by "look[ing] to federal common law for the application of this rule." Pet. 9. Specifically, they contend that the Tenth Circuit improperly relied on federal rather than state case law to determine which party had the burden of proof on the offset issue. The decision below itself never analyzed the burden of proof question, instead quoting *U.S. Industries, Inc.* v. *Touche Ross & Co.*, 854 F.2d 1223, 1261 (10th Cir. 1988), in a parenthetical without discussion. Presumably, petitioners' entire challenge to the Tenth Circuit's decision rests on that one citation. But petitioners themselves cited *Touche Ross* extensively to the court of appeals as being in "accord" with Oklahoma law. See First Brief at 17-18, 21.

Significantly, petitioners fail to show how Oklahoma's "one satisfaction" judgment reduction rule differs substantially from the analogous federal rule.[1] Both rules are designed to prevent double recovery by a plaintiff for the same injuries. See *Carris* v. *John R. Thomas & Assocs.*, 896 P.2d 522, 530 n.21 (Okla. 1995) (no double recovery permitted under Oklahoma law, which "allows only one recovery to make a plaintiff whole"); *Touche Ross*, 854 F.2d at 1261 ("[T]he one satisfaction rule provides that, under ordinary circumstances, an injured party may recover only once for an injury he has incurred."). Petitioners assert a material difference between Oklahoma and federal rules regarding the burden of proof in judgment-reduction claims; accord-

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[1] Petitioners tacitly conceded as much below by citing federal and state law interchangeably in their appellate briefs. See First Brief at 17-23; Third Brief on Cross Appeal of Defendants-Appellants UMIC, Inc. and Charles Alex Denney/ Cross Appellees at 5, 7, 10.

ing to petitioners, federal law places the burden on defendants, while state law places the burden on plaintiffs.[2] Pet. 9. Relying only on a footnote of *dicta* from *Carris* (a case that only tangentially addressed the judgment reduction rules and the burden of proof issue), petitioners insist that Oklahoma law always places the burden of proof on the plaintiff—here, the FDIC. *Ibid.* However, another Oklahoma case, *American National Bank of Enid* v. *Crews*, 126 P.2d 733, 745 (Okla. 1942), squarely held that the defendant claiming offset bears the burden of proof. Indeed, petitioners acknowledge that "in *American National* the court found defendants' proof had failed, and therefore, defendants were not entitled to any offset." Pet. 8. They seemingly do not realize that this case flatly contradicts their central argument. Moreover, even if (contrary to *American National*) petitioners had established that Oklahoma law requires the plaintiff to bear the burden of proof, they have not shown that federal law necessarily differs. Indeed, under *Touche Ross*, the burden of proving that a settlement represents common damages with the jury award may shift to the party opposing judgment reduction (*i.e.*, the plaintiff) in certain circumstances. Pet. 16 n. 15 (citing *Touche Ross*, 854 F.2d at 1262).

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[2] In any event, it is unlikely that the threshold question of whether joint tortfeasors caused identical injuries turned on which party bore the burden of proof. The courts below were familiar with the complex facts concerning the two prior settlements and this lengthy litigation, yet neither hesitated to conclude that the injuries compensated by the damages award and the settlement were not identical and that denial of the credit would not constitute double recovery for the same injury. Pet. App. 35-36; see also *id.* at 6-8.

As required by *O'Melveny & Myers*, the Tenth Circuit properly applied Oklahoma state law to the facts of this case. At heart, as demonstrated by the extensive fact-based discussions in their petition for a writ of certiorari, petitioners would have this Court decide whether the necessary predicate for judgment reduction, that joint tortfeasors caused a single injury, has been established. See Pet. 10-16. But every judge to consider the question has concluded that it has not; there is no reason for this Court to revisit that factual dispute. See *Goodman* v. *Lukens Steel Co.*, 482 U.S. 656, 665 (1987) (where both courts below resolve factual issue against petitioner, further review is not warranted). Petitioners have demonstrated no conflict with this Court's precedent, no conflict among the courts of appeals, and no question of recurring national importance. Therefore, the Tenth Circuit's decision does not merit further review.

2. Petitioners also argue that the Court should grant certiorari to resolve an alleged conflict between the Tenth Circuit's decision below regarding credit for the CEA settlement and the 1976 decision of the Fourth Circuit in *MacKethan* v. *Burrus, Cootes and Burrus*, 545 F.2d 1388 (1976), cert. denied, 434 U.S. 826 (1977).[3] Pet. 18. In *MacKethan*, the court of appeals credited the entire amount of a $6 million prior settlement to offset a $1.1 million jury award against a non-settling

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[3] Although they now argue that setoff rights to the CEA settlement are governed by federal law (see Pet. i), petitioners argued before the Tenth Circuit that state law applied, and they did not distinguish among the settlements. See First Brief at 16-23. Thus, petitioners appear to have waived this claim by failing to assert it below. See *Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970) (issue not raised in or discussed by court of appeals is not properly before Supreme Court).

defendant in a federal securities case. Like the challenged Tenth Circuit ruling, the Fourth Circuit's decision turned on the particular facts and circumstances of the case; there is no conflict between them. Indeed, the Fourth Circuit went out of its way to emphasize "that there are often subtleties, both substantive * * * and procedural * * * [,] involved in cases where credit is sought by one joint tortfeasor for amounts paid to the injured party by another joint tortfeasor." 545 F.2d at 1391 (citations omitted). The court concluded that it did not need to address the subtleties of federal judgment reduction jurisprudence because the facts before it were clear; the prior settlement was six times as large as the jury verdict, so the "Receiver has no grievance if we attribute a little more than one-sixth of the $6,000,000 which he received [from the] settlement, to damages [resulting from the transactions covered by the jury's award]." *Ibid.* By contrast, in this case, where the settlements received by the FDIC and the jury award combined were substantially less than the brokers' commissions, the court looked to the facts and particular jury findings to determine that the settlement and the jury damage awards were for separate, not common, damages. Differences in the facts and circumstances of each case, not disagreements over the proper legal standard, explain the differing outcomes in this case and the earlier Fourth Circuit decision. Accordingly, review by this Court is not warranted.

Even if there were a true conflict between the Tenth and Fourth Circuits, as petitioners' reliance on one 22-year old case in an effort to show a circuit conflict demonstrates, federal jurisprudence regarding judgment reduction is not frequently litigated, and the operation of the rule is not ripe for review by this Court. Neither *MacKethan* nor the state authorities cited by petition-

ers, Pet. 18-19, that apply state law, fully examine all of the nuances of the federal judgment reduction rule. This Court's consideration of judgment reduction rules should await more thorough consideration of the issue in the courts of appeals.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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SEPTEMBER 1998